 William Hoffman  
01/31/02 10:19 AM

To: Elaine Suriano/DC/USEPA/US@EPA  
Subject: Re: Draft notes of our 1/29/02 post CEQ discussion

Thanks- looks OK to me. We have an internal meeting with the RA to discuss the issues on Feb 4th. I will keep you informed as appropriate.

Bill

Elaine Suriano

Elaine Suriano  
01/30/02 08:50 PM

To: Joseph Montgomery/DC/USEPA/US@EPA, Gregory  
Peck/DC/USEPA/US@EPA, Michael Castle/R3/USEPA/US@EPA,  
Kathy Hodgkiss/R3/USEPA/US@EPA, William  
Hoffman/R3/USEPA/US@EPA

cc:  
Subject: Draft notes of our 1/29/02 post CEQ discussion

I have attached a summary of our 1/29/02 post CEQ mtg. Please review and edit if necessary.

My notes were just bullets and I did not get everything down. So, feel free to modify per your notes.



epajan29.wpd

Elaine Suriano  
Office of Federal Activities  
Environmental Scientist  
Ph-202/564-7182, Fx-564-0072

Summary of 1/29/02 mtg - debriefing from CEO update on Mt Top EIS

Participants:

Joe Montgomery, Elaine Suriano, Mike Castle, Kathy Hodgkiss, Bill Hoffman, Greg Peck

EPA staff convened a meeting to discuss next steps given the issues discussed at the CEQ mtg and other factors (EPA's Fill Rule, Rivenburgh Case, Nationwide 21) that could impact the Mt Top EIS.

Bill asked if we could get a bit more clarification on whether CEQ would be comfortable with no preferred alternative given the rationale presented at the 1/29/02, 10 pm CEQ mtg. Elaine/Joe agreed to follow-up on that.

Greg summarized the status of EPA's Fill Rule and suggested that we proceed thoughtfully in terms of what we ask OSM to do or not do concerning modification of their rule. Bill felt it was pretty clear where they were heading and that those changes and selecting alternative B was a likely outcome. Greg suggested that Reg 3 & 4 have a discussion in the next week or so on the Fill Rule and how this might impact the EIS. Bill will keep OFA apprized of mtg outcomes.

Should EPA have concerns with choosing alt. B as the preferred we need to have a process to raise this through our mgt. The question of whether HQ's or the Reg is the lead. HQ's OFA was under the impression that this was a Reg 3 lead. Reg 3 thought that since McCabe came to HQ and brought the project the decision making would occur at Hqs. Participants will discuss with their respective mgrs.

Mike raised the issues that OSM almost has to go with alt B. and that without mining we might not get the old sites reclaimed. Also, OSM will have to rely on encouraging adequate mitigation (reforestation) because of private property issues. We should seek a middle ground in terms of soil mix that will sustain trees vs. very stringent SOPs that were proposed in WVA.

We discussed the possibility of a field trip in Feb. (Mike C., Kathy, Elaine and 2 folks from OSM). Mike said even if we go now we should see sights in summer as well to see the full effect of reclamation. Elaine will follow up and get back to folks.

The outcome from the Rivenburgh case could impact the EIS. We will continue to keep tabs on it. We should brief Reg 4 on issues raised here today and make sure they are adequately represented at future workgroup meetings. Does anyone know the status of the 404(c) action related to this case?

While Nationwide 21 was discussed it does not appear that the EIS will be shedding much light on those issues. Do the comments that EPA issued on Nationwide 21 have any relevance to the MT Top EIS?

Some of our next steps depend on where the workgroup goes from here. It may be useful for this group to have another discussion in a few weeks.

EXHIBIT 12



William Hoffman  
02/07/02 08:47 AM

To: Rebecca Hanmer/R3/USEPA/US@EPA  
Subject: Re: Declined: MTM/Valley Fill EIS

Rebecca:

The length of time Don and Tom have allotted for this meeting indicates its importance. They want to be briefed on all the finer details involved with the EIS, ie- the tech study results and the alternatives/action items we've developed, so they can understand the policy choices now before them and the Agency. Don is having a meeting the following day with OSM leadership- where we can expect OSM to promote their vision, their desire to pick Alternative B as the preferred alternative in the draft EIS, and perhaps their desire to eliminate terrestrial action items from being actively considered in the EIS as real policy response options. Shortly after these two meetings, we will take the show to HQs- where decisions will probably be made on the direction we want to take as an Agency.

If your call doesn't happen or ends early- I would really like you to be there if possible to back me up. Thanks!

Bill

Rebecca Hanmer

Rebecca Hanmer  
02/06/02 05:44 PM

To: Kathy Hodgkiss/R3/USEPA/US@EPA  
cc: William Hoffman/R3/USEPA/US@EPA  
Subject: Re: Declined: MTM/Valley Fill EIS

Kathy, I appreciate very much being invited to this meeting and regret having to decline. I am one of the co-chairs of the Ches. Bay WQ Subcomm. and we have a subcommittee conference call scheduled Monday from 2:00 until 4:00. If the call ends early, I will come to the EIS meeting if it's still going on. Please let me know if there is a change in schedule. Thanks, Rebecca

You have declined this request

#### You have declined this request

Begins: 02/11/2002 02:30 PM Local Time  
Ends: 02/11/2002 04:30 PM Local Time

Conflicting dates:

Title: MTM/Valley Fill EIS  
Location: RA's conference room

Chair: Kathy Hodgkiss/R3/USEPA/US

To (required): Bob Mitkus/R3/USEPA/US@EPA, Donald Welsh/R3/USEPA/US@EPA, Michael Castle/R3/USEPA/US@EPA, Michael Kulik/R3/USEPA/US@EPA, Ray George/R3/USEPA/US@EPA, Rebecca Hanmer/R3/USEPA/US@EPA, Rich Kampf/R3/USEPA/US@EPA, Tom

Slenkamp/R3/USEPA/US@EPA, Tom Voltaggio/R3/USEPA/US@EPA, William Hoffman/R3/USEPA/US@EPA

cc (optional):

Comments

EXHIBIT 13



William Hoffman  
02/13/02 10:17 AM

To: Gregory Peck/DC/USEPA/US@EPA  
Subject: Re: EIS

We've spent or committed about 4.5 million. We will spend another 500K to finish up- depending on how the public comment period goes.

Gregory Peck

Gregory Peck  
02/12/02 03:36 PM

To: William Hoffman/R3/USEPA/US@EPA  
cc:  
Subject: EIS

Bill:

DOJ is writing their brief in this Rivenburg case and would like to know how much the government (all agencies) has currently spent on the EIS and how much we expect to spend to complete the final EIS. Round numbers are fine.

If you could let me know asap I would appreciate it.

Hope all is well in Philly,  
Greg

EXHIBIT 14



William Hoffman  
02/13/02 08:57 AM

To: Kathy Hodgkins/R3/USEPA/US@EPA  
Subject: Next Steps

Kathy:

How do you want to handle setting up the HQ meeting. I doubt that the EIS decision tree has ever been on anyone's radar screen down there, and it has probably always been presumed to be the Region's call. We have been trying to set something up for months without success- which might be an indicator of their interest level. Greg Peck has been the main point of contact on the issue in OWOW primarily with respect to the court case and the fill rule, but he has had very little involvement in the EIS. Jim Serfis- who is no longer with the agency- was representing OFA until Elaine Suriano got involved a month or so ago. I am also 95% confident that none of the current AA's have been involved- other than the 1 or 2 meetings that Tracy Meehan may have attended on the fill rule. That being the case, we may really confuse them if we go down there seeking input on who is the decisionmaker. It's true that McCabe took the issue with him to HQs, but it was his issue more than HQs issue. It's also true that it affects two EPA Region's, but Region 4 has not been very involved in the EIS decisionmaking process to this point either. It might be best for us to approach HQ's (with R4 in attendance???) as if we are merely seeking their input before Don decides which way to proceed. I would also suggest including both OFA and Water in the meeting, since both have an interest in the outcome.

In any case, here's some issues I think we should take with us when we go to headquarters:

1. VISION: My biggest concern is that OSM seems to be understating the "environmental criteria" aspects of the Section 404(b)1 guidelines that must be satisfied before a decision to issue a permit can be made. OSM seems to be focusing solely on procedural aspects, which, if satisfied, will always lead to permit issuance; i.e. if the applicant minimizes the amount of fill, develops mitigation measures, and evaluates alternatives, a permit will always be issued, even if the impacts continue to be significant. If OSM focuses solely on incorporating the procedural aspects of the Section 404(b)1 guidelines without including the "environmental criteria", the Section 404/SMCRA merger will be incomplete. The reason this is troubling to me is a statement made during our discussions in DC a few weeks ago by an OSM attorney which suggested that if an operator meets the performance standards in the SMCRA regulations they get a permit, and that permits will not be denied based upon environmental effects as long as the operator is meeting those performance standards. We must make sure that the SMCRA rule changes incorporate performance standards that look at both process and environmental effects (material damage in OSM lingo) if the one stop permitting process is to work. (I'm sure that the public comment process will make sure that happens whether or not we persuade OSM to tighten up their language now).

2. PREFERRED ALTERNATIVE: I see us heading towards the selection of Alternative B as the preferred alternative in the EIS. If we decide to do this, we need to characterize why we would support such an alternative as a PR strategy. We must make it clear that the regulatory review process will be significantly improved under Alternative B, and that as a result, impacts will be minimized. We might also want to suggest that picking Alternatives C or D would end up creating a lot of small fills that could have more impacts to the headwater system than the one or two larger ones that might be permitted under an Alternative B construct.

3. MULTIPLE REGION ISSUE: Under Section 309 of the CAA, EPA is supposed to comment on the EIS. As R3 has been the lead in preparing the EIS, perhaps R4 should be the lead in preparing the Agency's comments on it.

EXHIBIT 15



Mike Robinson  
<MROBINSO@OSMRE.GOV>

02/15/02 02:24 PM

To: Jeffrey Alper/R3/USEPA/US@EPA, Gregory Peck/DC/USEPA/US@EPA, Gary Bryant/R3/USEPA/US@EPA, Michael Castle/R3/USEPA/US@EPA, Kathy Hodgkiss/R3/USEPA/US@EPA, William Hoffman/R3/USEPA/US@EPA, Elaine Surlano/DC/USEPA/US@EPA, "Benjamin Tuggle"@fws.gov, jstump@gnnet.com, Charles.K.Stark/HQ02.USACE.ARMY.MIL, Katherine.L.Trott/HQ02.USACE.ARMY.MIL, gconrad@imcc.iss.us, James.M.Townsend/ir02.usace.army.mil, dvandelinde@mail.dep.state.vv.us, rhunter@mail.dep.state.vv.us, Paul.Rothman@mail.state.ky.us, bol@mme.state.va.us, lav@mme.state.va.us, Andrew DeVito <ADEVITO@OSMRE.GOV>, Al Klein <AKLEIN@OSMRE.GOV>, Bill Kovacic <BKOVACIC@OSMRE.GOV>, Dave Hartos <DHARTOS@OSMRE.GOV>, Dan Ross <DROSS@OSMRE.GOV>, Buck Miller <GMILLER@OSMRE.GOV>, Jeff Coker <JCOKER@OSMRE.GOV>, John Craynon <JCRAYNON@OSMRE.GOV>, Larry Trainor <LTRAINOR@OSMRE.GOV>, Mary Josie Blanchard <MBLANCHA@OSMRE.GOV>, Mike Robinson <MROBINSO@OSMRE.GOV>, Roger Calhoun <RCALHOUN@OSMRE.GOV>, "Robert A. Penn" <RPENN@OSMRE.GOV>, Vann Weaver <VWEAVER@OSMRE.GOV>

Subject: Citizen Complaint Study for EIS

Attached is the subject document for use in the draft EIS.

EISMTMBL.WPD

## Blasting Related Citizen Complaints within the Mountaintop Mining/Valley Fill Environmental Impact Statement (EIS) Study Area

### Introduction

Individual citizens and citizens groups have expressed concern for many years that the various state regulatory authorities do not serve the interests of the citizens on blasting damage complaints. As a result of these concerns, in FY 1999, the OSM Executive Council directed the formation of an OSM blasting team to conduct a national study, collecting and analyzing citizens complaints related to surface coal mine blasting.

### Background

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) was designed to protect all structures outside the permit area from damage relating to ground vibrations, air blast and flyrock, as well as protecting all citizens from injury as a result of blasting. People often feel the house shake and hear rattling caused by ground and air vibration levels well below those levels that cause damage to structures. In the experience of OSM and other regulatory authorities damage is rarely found where blasting vibrations are kept within the regulatory limits. Very often the citizen does not complain that a *specific* blast resulted in *specific* damage. The complaints are often that the citizen is "feeling" the blasting and that the blasting is doing some non-specific damage to public or private property.

The investigation of a blasting complaint requires a person with specialized technical training in blasting, seismology, acoustics and construction engineering. Because of the complexities in each complaint and the uniqueness in the process each regulatory authority exercises in dealing with these complaints, it is difficult to compare one regulatory authority with another or with relating one region of the country with another. Where comparisons could be made without destroying the quality of the data, those comparisons were made and conclusions were drawn.

For the purpose of this EIS, only the data relating to Central and Southern West Virginia, Eastern Kentucky, Southwestern Virginia, and Tennessee was used. The reason for this is that these are the only coal producing areas where Mountaintop Mining is conducted. Mountaintop mining may include mountaintop removal (MTR) mining, where many coal seams are completely extracted from the upper reaches of a mountain. MTR is usually associated with cast type blasting. Cast blasting uses large amounts of explosive agents, not only to fracture the rock overlying the coal, but also to move the fractured rock so that handling by mechanical excavators is minimized. Cast blasting is not a new concept in mining (Legislative History-Committee on Interior and Insular Affairs; House of Representatives; 92 Congress; September 21, 1971).



The following blasting complaint data was gathered for the period 7/98 to 6/99:

Area	Total Blasting Related Complaints
Southwestern VA	87
Central and Southern WV	339
Eastern KY	205
TN	6

#### Data Summary:

1. Nationally, the greatest number of complaints were lodged in central and southern West Virginia and eastern Kentucky (53.2 percent and 32 percent, respectively). Southwestern Virginia and Tennessee follow with 13.6 percent and one percent, respectively.
2. Annoyance/ noise which relate to concerns for excessive vibration (house shaking) accounted for about 70 percent of the complaints in the four state area.
3. Alleged damage to structures (residential dwellings) accounted for about 25 percent of the complaints.
4. Alleged complaints of damage to domestic water well systems accounted for about 2 percent of the complaints.
5. Complaints of excessive dust and fumes accounted for about 1 percent of the complaints.
6. Complaints of flyrock accounted for 2 percent of the blast related citizen complaints. Flyrock has the greatest potential for causing damage to property and injury or death to persons who reside in the mining areas.

#### Dust, fumes and gases

The data do not indicate that excessive dust and fumes are a significant problem with a complaint percentage rate of only 1 percent. The fumes are by-products of the explosive reaction and are usually released at a temperature somewhat higher than the ambient air temperature of the mining environment. Fumes from the explosive reaction will rise and expand adiabatically as a result of this differential temperature gradient. This adiabatic process will usually force these gases to higher altitudes and away from the residential areas.

The dust and fumes are also acted on by the winds aloft and dissipate over short distances. It is always a good blasting practice to conduct blasting at the most advantageous meteorological periods. On occasion, temperature inversions will cause the fumes and dust to stay close to the ground and possibly drift off site. Large mining operations often use wind socks located in various locations around the mine in order to monitor wind speed and direction. Using this information, the mines will blast only during periods of high wind directed away from populated areas. This has proven to be a low-technology and low-cost solution to the dust and fumes concerns of the nearby residents.

#### Flyrock

Complaints of flyrock, material traveling through the air or along the ground outside the permit area makes up only 2 percent of the blasting complaints. Although flyrock accounted for just over 2 percent of the complaints, flyrock has the greatest potential for causing death and injury to persons as well as damage to private property.

The primary cause of flyrock is inadequate blast design, failure to pay attention to detail when loading blast holes or changing geology. Proper supervisory controls, training of blasters (both certified blasters and the blasting crew) and the establishment of set procedures are the best methods to eliminate flyrock. To protect the public, the blaster is responsible for clearing the blast area (any place flyrock might be expected) prior to the detonation.

#### Water Well Quantity and Quality

Two percent of the complaints in the study area were related to domestic water wells. Scientific studies have determined that there is an extremely low probability of causing damage to a domestic water well by blasting activities associated with mining, quarrying or road construction. When a water well is damaged by mining activity, quarrying or road construction, it is almost always caused by an interruption of the aquifer--either by draining the aquifer, or cutting off the recharge to the aquifer as a result of the mining excavation. Problems with the quality of well water are almost always the result of an increase in dissolved solids at the well from groundwater percolating through the rubble zone of the backfill area.

Even though ground vibrations induced by blasting has not been shown to cause changes to the quality or quantity of well water, OSM is currently undertaking an additional study of blasting effects on water wells.

#### Annoyance

Complaints of annoyance accounts for a over 70 percent of the complaints in the study area. Annoyance includes, startle, noise, fear of damage, blasting too hard, objects moving on shelves, windows rattle, frightens the children, etc. Unfortunately the law does not allow OSM to prevent annoyance. Peoples homes may be shaken by the blasting, which is annoying to most people,

but mines are not allowed shake the house and cause property damage. Both ground vibrations and air vibrations cause homes to shake.

Ground vibrations enter a house through the ground and airblast through the roof or building side. As a result the house will respond or shake. A typical house will respond 1 to 3 times the ground vibration level. The higher shaking is caused when the vibration frequency of the ground matches the natural frequency of the house, causing it to resonate. The natural frequency of typical homes is between 4-12 Hertz. In other words when the frequency of the incoming vibrations match the natural frequency of the house, the house will ring. The greater the difference in frequencies between the vibration of the ground and the house, the less the house responds. This significantly impacts people's perception of the blast depending on how the house is built and how it is constructed. It also explains why the same vibration will cause a complaint at one house but not the neighbors (i.e. the neighbor house has a different natural frequency)

Complaints of annoyance can stem from the lack of communication between the coal operators and the citizens in the community. A well-implemented public relations program sometimes significantly reduce complaints. OSM experience is that the coalfield citizens typically desire more information from the regulatory authority and the mine operator. The regulations require, at a minimum, information notice to citizens such as blasting warning signs and warning signals, pre-blasting surveys, pre-permit public involvement and a comment period for the citizen to express their concerns.

Some operators and regulatory authorities have held public meetings in order to involve the public and inform them on what they can expect to experiencing living near the mining operation. This would include a dialog on blasting and the possible effects on the community. Exchanges of information prior to mining and blasting may reduce the number of annoyance complaints.

#### Vibration Damage

Allegations of blast damage to property were lodged in 25 % of the complaints. Property damage could be broken windows, cracked walls, broken bricks, wall separations, doors sticking, chimney cracks, foundation cracks, driveway cracks, roof leaks, etc. When damage is alleged, the regulatory authority is required to evaluate the damage potential.

Scientific investigations by various investigative groups, including the U. S. Bureau of Mines has related the occurrence of damage at typical structures to the intensity and frequency (in cycles per second) of blast induced vibrations. This data has accumulated over a period of more than 60 years. An analysis of data collected by the Bureau of Mines shows that no damage<sup>1</sup> (threshold, minor or

<sup>1</sup>There are three classifications of damage-*Threshold* -Loosening of paint, small plaster cracking at joints, lengthening of old cracks. *Minor*-Loosening and falling of plaster, fall of loose mortar, hairline to 3-mm cracks. *Major*-Cracks of several mm in walls, structural weakening, fall

major) is expected at ground vibration levels at or below 0.5 in/sec (ips). Within a 95 percent confidence interval, major damage can not be expected below about 2.34 ips; and minor damage can not be expected below about 1.80 ips. Airblast below 134 dB has never been documented.

OSM and other state regulatory authorities, throughout almost 25 years of SMCRA control, have not found conclusive evidence of damage to typical structures at ground vibration and airblast levels below the performance standards of the regulations. However, OSM is currently conducting research on the effect of blasting vibrations and airblast on mobile, log, and other types of non-traditional residences.

#### Conclusions

Based upon the results of the survey, annoyance is the chief source of citizen complaints about blasting. The survey conducted could not capture whether each complaint was a legitimate complaint of damage, or a complaint of concern that damage has occurred or may occur. Many citizens complaints take several years before final resolution. Some complaints result in regulatory litigation against the mine or tort litigation by the citizen in state courts before final resolution.

Complaints that are lodged with the regulatory authorities may be resolved in a more timely manner by lodging the complaint instead with the insurance company that represents the coal mine operator. Section 507 (f) of SMCRA requires that each permit applicant obtain public liability insurance. This policy must provide for personal injury and property damage protection as a result of surface coal mining, and includes damage or injury that are the result of the use of explosives. Insurance companies are required by state law and regulation to investigate each allegation of damage or injury. Should a claim of damage or injury be denied, the insurance company must have a rational bases for rejecting any claim. Any decision by an insurance company is subject to civil litigation in the appropriate state court.

The regulatory authorities can not require the coal mine operator to make compensation for damages or require the operator to repair any damage that is alleged to have been caused by blasting. The regulatory authorities can (and some have) advised the citizen to contact the insurance company directly or they have required the operator to refer a claim to their insurance company.

The performance standards in the blasting regulations were established to provide protection against damage to typical homes that are located in the coal producing regions. Both SMCRA and the regulations make it clear that all private property must be protected from damage. This includes the typical structures as well as any unique structures that may be more sensitive to damage because of age (e.g. historical structures, old stone walls) or those structures that are poorly constructed or constructed of poor quality building materials.

of masonry. (U.S. Bureau of Mines RI 8507)

The regulations allow the regulatory authorities to reduce the peak particle velocity and airblast standards when blasting activity may impact these type structures. This is to say, that a one inch per second peak particle velocity that would be safe for a properly constructed typical home may not be the appropriate vibration level for a historic structure where the walls and ceiling are made of plaster. OSM has not seen many cases where the regulatory authorities have established a lower vibration or airblast standard on a site-specific basis to tailor the performance standards in order to protect unique structures. The regulatory authorities do not want to appear arbitrary or capricious in setting a lower standard and may not have the expertise to evaluate the structure in order to set that lower standard.

The survey also indicates that the states with the largest number of mines located in populated areas also have the greatest number of complaints.

The regulations allow the regulatory authority to require any and all blasts be monitored using a blasting seismograph which monitors both ground vibrations and airblast. Often the monitoring of blasts is only required as a reaction to citizen complaints. The survey indicates that there is little proactive monitoring by either the regulatory authority or the operator. In areas where there will be continued blasting activity over a long period of time and where there is a population concentration there should also be frequent monitoring of blasts in order to establish a record of the intensity of ground vibrations and airblast that is generated by the mine and extends into the area around surrounding the mine.



William Hoffman  
02/27/02 01:42 PM

To: Tom Welborn/R4/USEPA/US@EPA  
Subject: Re: R3 to brief Ben Grumbles on Mountaintop Mining EIS Status and Issues on 3/5/02

Tom:

We asked for this meeting so the RA could let HQs know that we are close to a decision point on the EIS, and to make sure that everyone is comfortable before any positions are taken. OSM has been pushing hard to avoid requiring reforestation and PMLU controls, and to create a one-stop permitting process for mining with the State SMCRA agency as the regulatory agency for CWA 402 and 404 permitting. They are beginning to understand that assumption isn't likely and that there is no such thing as partial assumption- so they are now focusing on SPGPs for mining.

They are going to propose rule changes at the same time the EIS goes out that would incorporate 404(b)(1) analyses into SMCRA regs and which would modify the stream buffer rule to permit fills under this "enhanced" State review process. As such, they are pushing for the selection of Alternative B in the EIS as the preferred alternative (fills would not be restricted to any particular watershed size or segment- but decisions would be made case-by-case under an improved regulatory scheme). Until the administration changed, we had agreed not to select any alternative as preferred, and to wait to see how the public reacted to the different options. That's all changed now under the current OSM regime.

As a minimum, we want HQs support for incorporating the reforestation and PMLU controls we've developed, and support to pull the NWP 21 minimal impact line back to the ephemeral or intermittent zone (the COE may be willing to pull back to the ephemeral line). If we can successfully use these as bargaining chips with OSM in return for our supporting the selection of Alternative B- we will be satisfied. Pulling NWP 21 back to the ephemeral line would also ease our problems with an SPGP.

Attached is an electronic version of the presentation we will be giving. One of the figures in the presentation shows that over 50% of the historic valley fills have been in watersheds less than 75 acres in size (> 3500 fills). This figure might help convince the COE and OSM that there would still be plenty of fills for the state to work on if the NWP/SPGP were keyed to the ephemeral/intermittent zone.

Call to discuss as you feel the need.

Bill



OW-QFA.exe

William J. Hoffman (3ES30)  
Environmental Services Division  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-2995  
Tom Welborn

EXHIBIT 17

## Mountaintop Mining EIS Presentation



## Mountaintop Mining EIS

Current Issues- Why We are Here

## Mountaintop Mining EIS

### Current Issues

- OSM envisions a one stop SMCRA/CWA permitting process for mining projects, and proposes to modify its stream buffer rules to incorporate avoidance, fill minimization, and mitigation/compensation tests similar to those found in the CWA Section 404(b)1 Guidelines. This would facilitate "Section 404 type" reviews by State SMCRA agencies, and set the stage for SGP development or program assumption efforts.
- DOI/OSM is developing a "pilot" one stop permitting process in Virginia in consultation with the Virginia Department of Mines, Minerals, and Energy. An interagency MOA is being drafted, but neither the COE nor EPA have been consulted.
- The direct and indirect aquatic impacts from MTM/VF operations are arguably more than minimal, complicating SGP development and the NWP 21 issue.

## Mountaintop Mining EIS

### Current Issues

- To accommodate the proposed revisions to the stream buffer rule, OSM is recommending that Alternative B (project-by-project reviews, no set restrictions) be designated as the preferred alternative in the draft EIS.
- Cumulative terrestrial impacts from MTM/VF activities are considered to be significant, and have a high level of public interest. Actions to promote reforestation involve private property rights and are difficult to implement. As a result, OSM and COE are reluctant to impose regulatory requirements to minimize terrestrial impacts.
- Post Mining Land Use (PMLU) studies suggest that, in general, post-mining development is not occurring as envisioned when variances are requested from the requirements to return the land to a condition capable of supporting its prior use. Actions to ensure that PMLU development occurs as envisioned have been developed, but OSM recommends deleting these actions from further consideration in the EIS.

## Mountaintop Mining EIS

### Current Issues

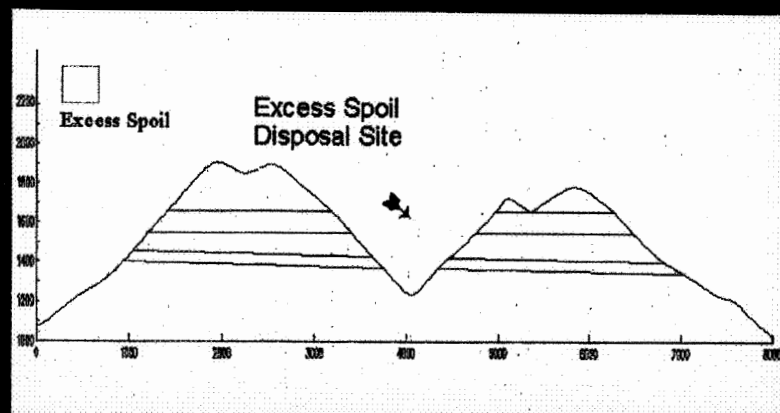
- The regulatory history of MTM/VF activities suggests that the development of a one stop permitting process, the lack of effective actions to minimize terrestrial impacts, the lack of effective actions to insure that PMLU occurs as envisioned, and the selection of Alternative B as the preferred alternative is likely to generate a significant negative response from the environmental community.

## Mountaintop Mining EIS

Mountaintop Mining  
-What Is It  
-Where Does It Occur

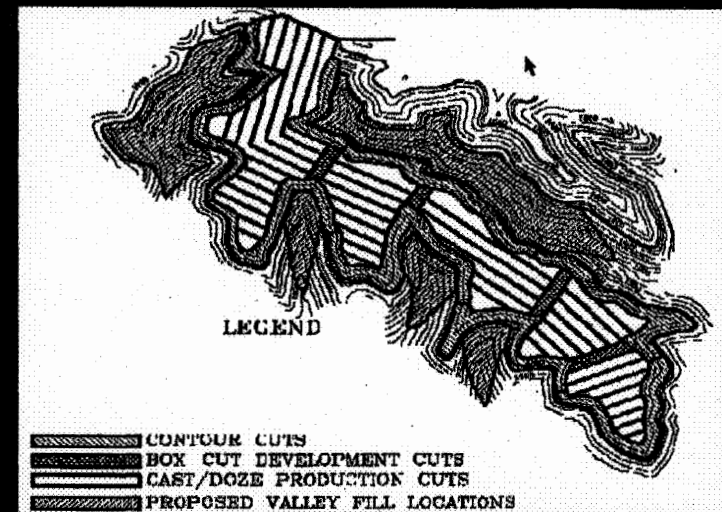
## Mountaintop Mining EIS

Typical Cross Section



## Mountaintop Mining EIS

Typical Mine Layout



## Mountaintop Mining EIS

Existing Operation



## Mountaintop Mining EIS

Existing Operation



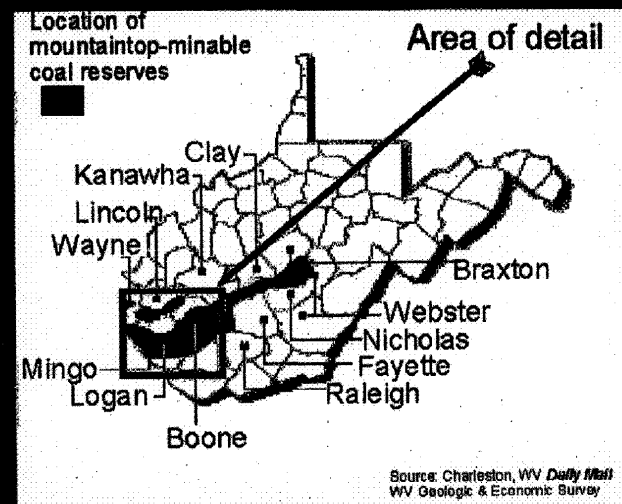


## Mountaintop Mining EIS

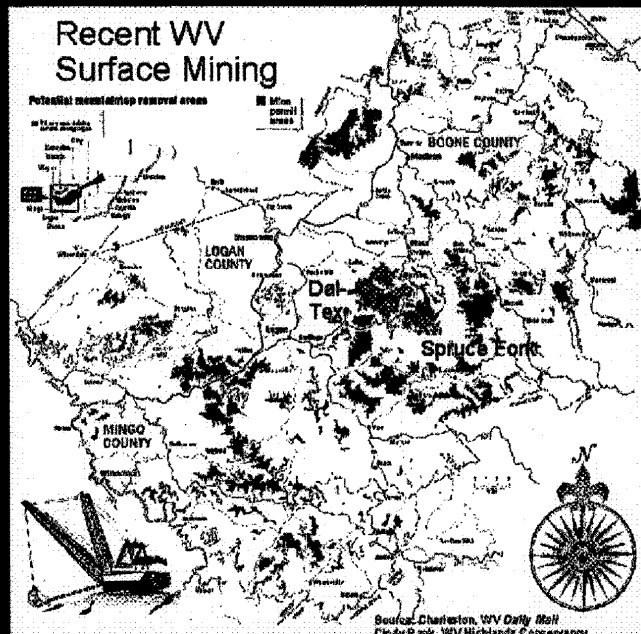
Existing Operation



## Potential WV Mountaintop Mining Areas

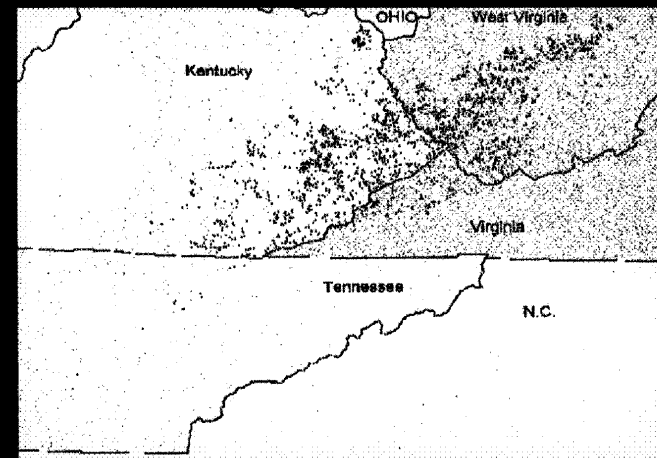


Source: Charleston, WV *Daily Mail*  
WV Geologic & Economic Survey



## Mountaintop Mining EIS

### Existing Fill Inventory



## Mountaintop Mining EIS

### Background

## Mountaintop Mining EIS

### Regulatory Background

- Surface Mining Control and Reclamation Act (SMCRA)- establishes permitting requirements for surface mining operations. Administered by the U.S. Office of Surface Mining (OSM) and/or delegated States such as West Virginia.
- OSM Regulations at 30 CFR Section 816.71 and 817.57 (Stream Buffer Rule)- requires that no land within 100 feet of a perennial or intermittent stream shall be disturbed unless authorized by the regulatory authority. The regulatory authority may authorize such activities only upon finding that the activity will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream.

## Mountaintop Mining EIS

### Regulatory Background

- **Clean Water Act Section 402**- establishes permit requirements for pollutant discharges (generally effluent wastes) into waters of the United States. Administered by the U.S. Environmental Protection Agency (EPA) and delegated States such as West Virginia.
- **CWA Section 404**- establishes permit requirements for discharges of dredged or fill material (generally solid fills) into waters of the United States. Administered by the U.S. Army Corps of Engineers (COE) or authorized States. EPA developed the environmental criteria for permitting under Section 404(b)1, and can veto COE permitting decisions under Section 404(c). No States are authorized to administer the CWA 404 program in the mountaintop mining region.

## Mountaintop Mining EIS

### Regulatory Background

- CWA Section 404 authorization can be granted through:
  - Individual Permits (IPs) for specific projects. Each project undergoes a separate public environmental review process.
  - General Permits/Nationwide Permits (GPs/NWPs) for classes of activities which have previously been evaluated and determined to have minimal impact on the environment. NWP 21 was developed by the COE for certain mining activities.

## Mountaintop Mining EIS

### Regulatory Background

- **National Environmental Policy Act of 1969 (NEPA)**- requires a detailed environmental evaluation of all major federal actions significantly affecting the human environment.
  - ▶ Undertaken by COE prior to issuance of CWA 404 IPs for specific projects, and prior to issuance of GPs/NWPs for classes of activities. Projects subsequently authorized under GP/NWP are considered NEPA compliant.
  - ▶ Undertaken by OSM prior to the issuance of SMCRA permits.
  - ▶ Not required for projects authorized by SMCRA/CWA programs that have been delegated to the States.

## Mountaintop Mining EIS

### Regulatory Background

- **Endangered Species Act**- establishes formal consultation requirements when Federal actions affect a listed species. Administered by the U.S. Fish and Wildlife Service (FWS).

## Mountaintop Mining EIS

Implementation Prior to 1998

- SMCRA permits were being routinely issued for valley fill projects.
- CWA 402 permits were being routinely issued for effluent discharges downstream of MTM/VF operations.
- CWA 404 requirements were being inconsistently applied:
  - Some COE Districts were determining that VFs were discharges of mining wastes subject to CWA 402 requirements and were not regulating under CWA 404.
  - Some COE Districts were issuing authorization under NWP 21, arguing that impacts were being minimized as a result of the SMCRA/CWA 402 review process.
  - No NEPA analyses were being performed in West Virginia.

## Mountaintop Mining EIS

1998

- Spring 1998- Federal agencies and WV begin to focus on the issue. Informal environmental studies are proposed.
- July 1998- A lawsuit is filed by the WV Highlands Conservancy against WVDEP and USCOE in Federal District Court alleging improper application of the SMCRA stream buffer zone rule, the CWA Section 404 permit process, and NEPA.
- December 1998- A partial Settlement Agreement is entered resolving Federal portions of the case:
  - a programmatic EIS will be prepared within two years
  - greater scrutiny will be given to CWA Section 404 permits affecting watersheds >250 acres.

## Mountaintop Mining EIS

1999 to Present

## Mountaintop Mining EIS

1999

- February 1999- A Notice of Intent is placed in the Federal Register stating that a Programmatic Environmental Impact Statement (EIS) will be prepared by EPA, COE, OSM, FWS, and WVDEP. The purpose of the EIS is:
  - “To consider developing agency policies, guidance, and coordinated decision-making processes to minimize, to the maximum extent practicable, adverse environmental effects to waters of the United States and to fish and wildlife resources from mountaintop mining operations and to other environmental resources that could be affected by the size and location of fill material in valley fill sites.”

## Mountaintop Mining EIS

1999

- **October 20, 1999**- Chief Judge Charles Haden II of the United States District Court for the Southern District of West Virginia rules:
  - the buffer zone rule under SMCRA restricts valley fills from being placed in intermittent or perennial streams; and
  - excess spoil is a “waste material” subject to Section 402 of the CWA, not a “fill material” subject to Section 404 of the CWA.
- **October 29, 1999**- The Court by Memorandum Opinion and Order stays its October 20, 1999 ruling pending appellate action.
- **December, 1999**- Parties appeal the Haden decision. Federal Brief agrees that the District Court has subject matter jurisdiction and supports Haden on the SMCRA stream buffer ruling, but disagrees with Haden on the CWA Section 402/404 ruling. State and industry appeal all aspects.

## Mountaintop Mining EIS

2000 - 2001

- **April 2001**- the 4th Circuit Court of Appeals rules that the doctrine of sovereign immunity bars citizens from bringing their claims against a State official in Federal court; vacates the District Court’s injunction; and remands with instruction to dismiss without prejudice so the citizens can present their claims in the proper forum (State Court). The decision to prepare the EIS is unaffected.
- **October 2001**- the WV Highlands Conservancy appeals the decision to the U.S. Supreme Court.
- **January 2002**- the Supreme Court decides not to review the case.
- **February 2002**- Kentuckians for the Commonwealth file motion asking Judge Haden to block the Corps from issuing any new valley permits, arguing that the Corps has no legal authority to issue permits for waste discharges into streams.



## Mountaintop Mining EIS

### MTM/VF EIS Process

## Mountaintop Mining EIS

Parallel EIS Preparation/Settlement Efforts

Agency Principals (DOJ, EPA,  
OSM, COE, FWS, OMB, CEQ)

EIS Steering Committee  
(EPA, OSM, COE, FWS, WVDEP)

The Three Tracks  
of the  
Mountaintop  
Mining EIS

Technical  
Studies

Program  
Review

EIS  
Preparation

## Mountaintop Mining EIS

### MTM/VF EIS Process

- Public concerns are identified through a public scoping process.
- Programmatic alternatives and actions are developed for evaluation in the EIS.
- Technical studies are developed and initiated by the agencies.
- A contractor is hired to gather and analyze background data for inclusion into the EIS; to incorporate results of interagency technical studies into the EIS; and to prepare the EIS document for printing and distribution per Agency instruction.

## Mountaintop Mining EIS

### MTM/VF EIS Scoping Process- Concerns Raised By the Public

#### Environmental/Nuisance Impacts of Mining

- Destruction of aquatic and terrestrial resources
- Impacts to unique and endangered species
- Introduction of exotic and invasive species
- Damages to wells and homes from blasting
- Increased flooding
- Increased dust and noise
- Air quality deterioration from coal burning
- Less biodiversity and sustainability of ecosystems
- Adverse cumulative effects

## Mountaintop Mining EIS

MTM/VF EIS Scoping Process- Concerns Raised By the Public

### Economic Concerns

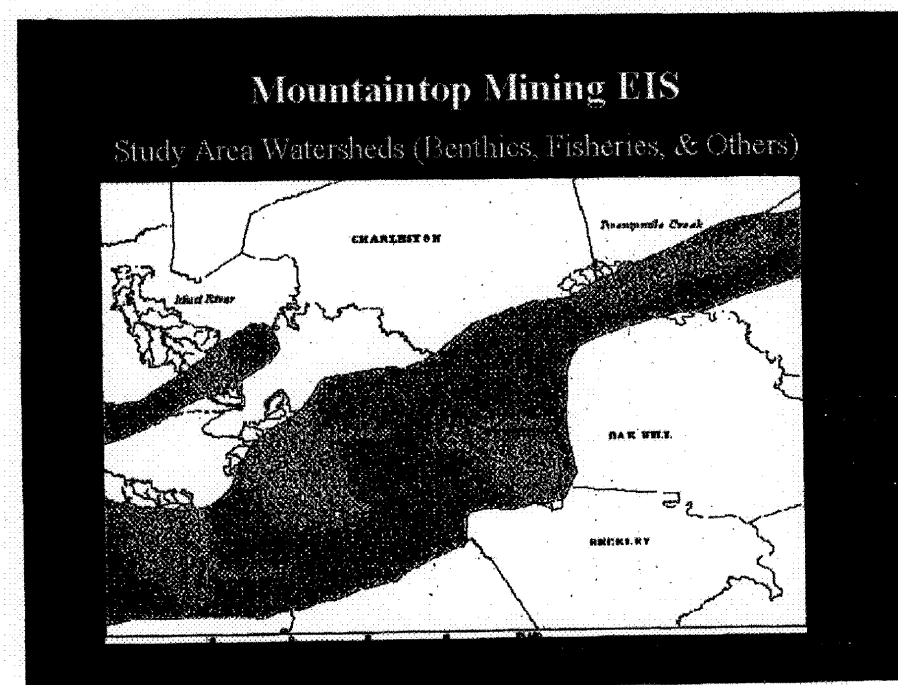
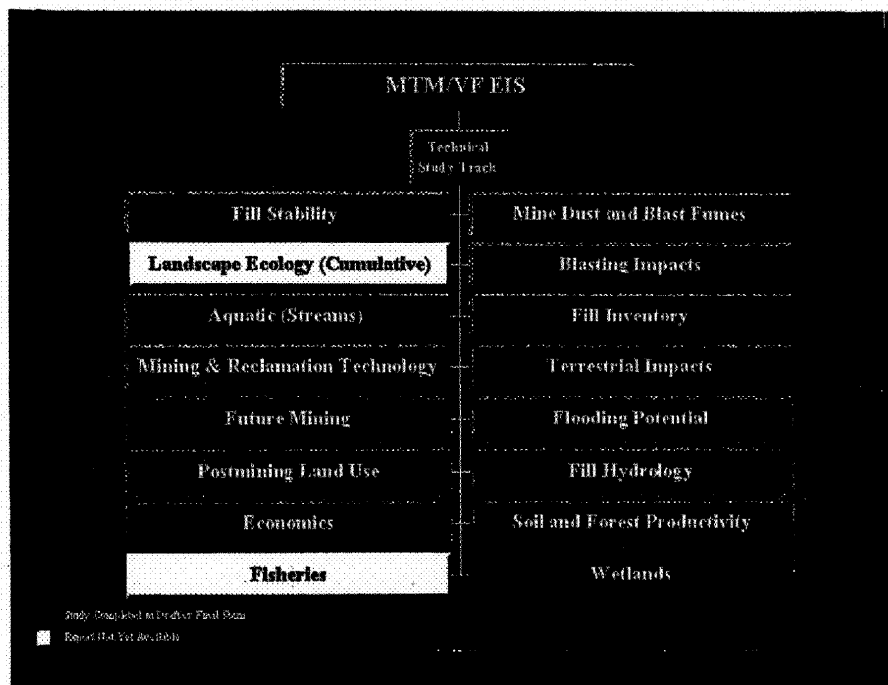
- New or revised regulatory requirements may cost mining jobs
- Mountaintop mining ruins opportunities for tourism and recreation
- Mechanization of large-scale surface mining reduces demand for coal miners
- New or revised requirements may lessen local governments' tax revenue
- New or revised requirements may cause the price of electricity to increase

## Mountaintop Mining EIS

MTM/VF EIS Scoping Process- Concerns Raised By the Public

### Social Concerns

- New or revised requirements may increase unemployment and erode the well being of families
- Mountaintop mining is destroying the history and culture of the Appalachian region
- Acquisition of private property and homes by coal companies for surface mining is destroying the essence of communities



## Mountaintop Mining EIS

### Preliminary Findings

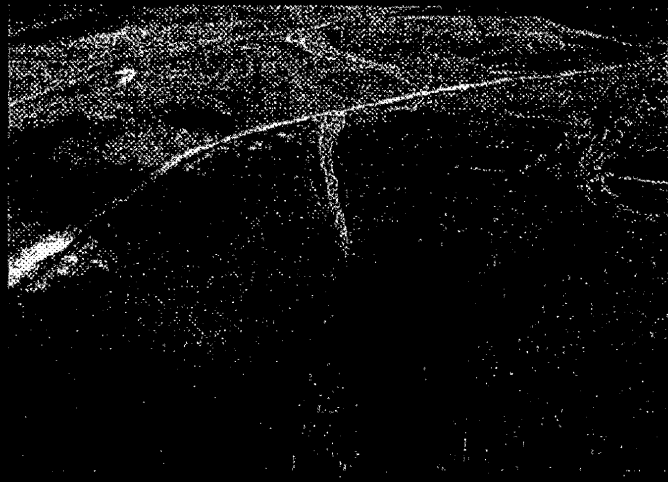
## Mountaintop Mining EIS

### Preliminary Findings of Technical Studies- Aquatic

- One percent of all streams in the study area (560 out of 55,000 miles) have already been eliminated by valley fills.
- Macroinvertebrate indices indicate that stream segments located downstream of valley fills are being impaired (aquatic life use).
- Stream chemistry monitoring efforts show significant increases in conductivity, hardness, sulfate, and selenium concentrations downstream of MTM/VF operations.
- Because it is difficult to intercept groundwater flow, it is difficult to reconstruct free flowing streams at MTM sites.

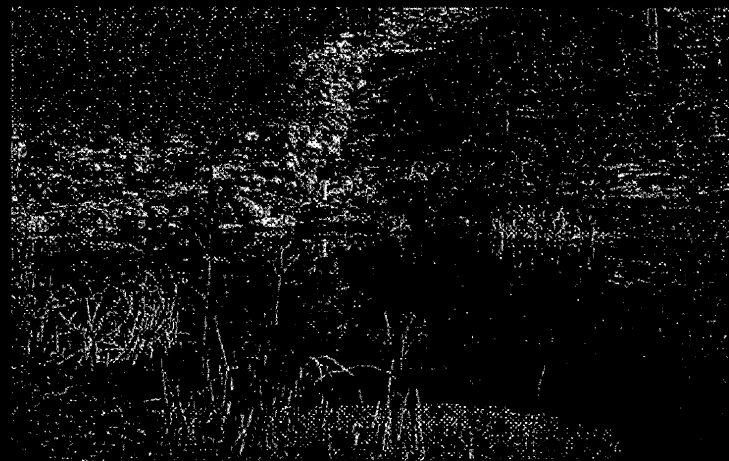
## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Aquatic



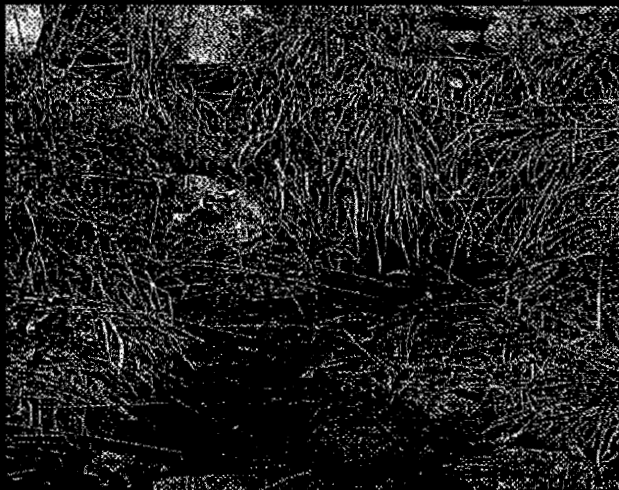
## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Aquatic



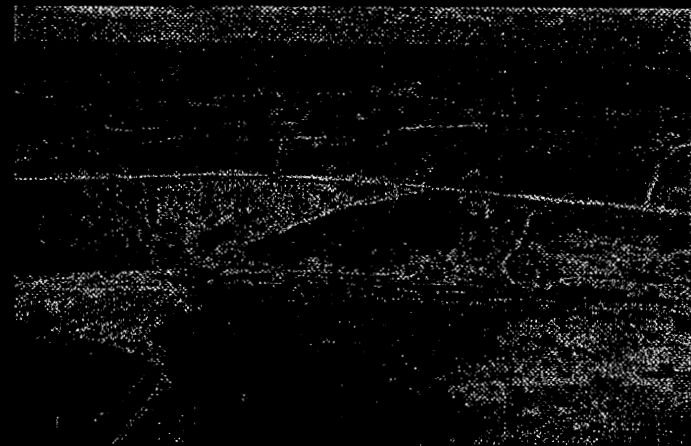
## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Aquatic



## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Aquatic



## Mountaintop Mining EIS

### Preliminary Findings of Technical Studies- Terrestrial

- The Appalachian Highlands is characterized by some of the best forest habitat in the world.
- Current reclamation practices are converting these forests to grassland, which may significantly impact neotropical migrant bird populations and other sensitive species if left unchanged.
- Mining companies can do more to minimize terrestrial impacts. Reclamation techniques have been developed over the past two years to promote reforestation, and the WV Legislature passed legislation in 2000 promoting the use of these reclamation techniques under the commercial forestry post mining land use category.

## Mountaintop Mining EIS

### Preliminary Findings of Technical Studies- Terrestrial





## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Terrestrial



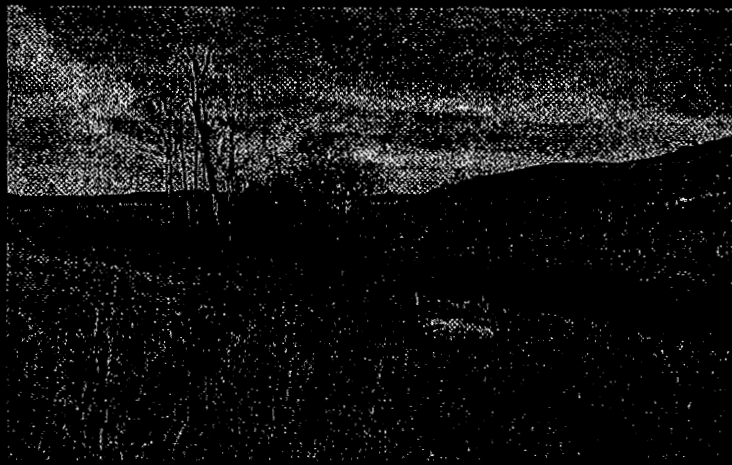
## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Terrestrial



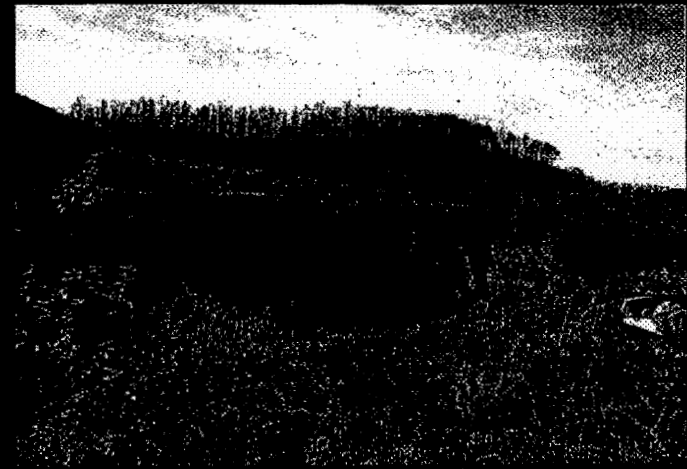
## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Terrestrial

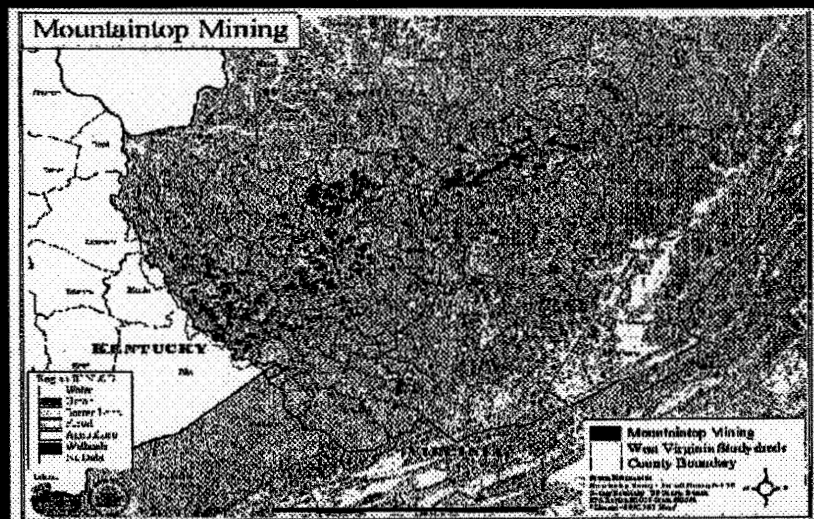


## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Terrestrial



### Preliminary Findings of Technical Studies- Terrestrial

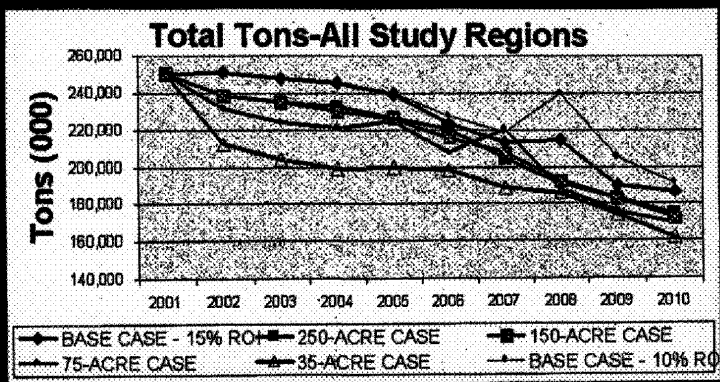


### Preliminary Findings of Technical Studies- Economics of Restricting Valley Fills

- Sufficient coal reserves appear to exist under the 250, 150, 75, and 35 acre restriction scenarios necessary to meet demand during the 10 year study period
- Limiting VFs to the ephemeral stream segment is likely to cause significant or total loss of the coal resource when that segment falls in a watershed less than 35 acres.
- Restricting valley fills to 250, 150, 75, or 35 acre watersheds will increase the price of coal by only \$1/ton under each respective restriction scenario.
- Restricting valley fills to 250, 150, 75, or 35 acre watersheds will increase the price of electricity by only a few cents/MWhr under each respective restriction scenario.

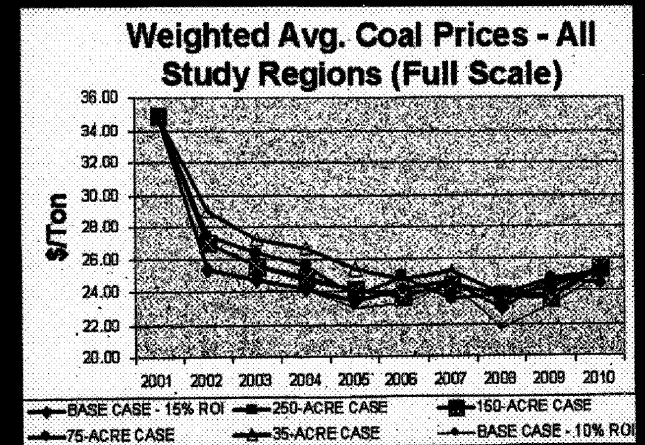
## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Economics of Restricting Valley Fills



## Mountaintop Mining EIS

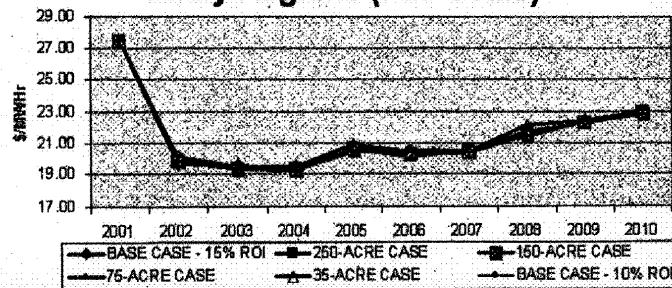
Preliminary Findings of Technical Studies- Economics of Restricting Valley Fills



## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Economics of Restricting Valley Fills

### Avg. Wholesale Electricity Price - All Study Regions (Full Scale)



## Mountaintop Mining EIS

Preliminary Findings of Technical Studies- Economics

Out of 5858 fills permitted since 1985, the majority have been proposed in watersheds draining less than 250 acres:

	< 75 acres	75 -250 acres	> 250 acres
WV	59%	34%	7%
KY	81%	14%	5%
VA	70%	26%	4%
TE	79%	19%	2%

## Mountaintop Mining EIS

### MTM/VF EIS Alternative Framework

## Mountaintop Mining EIS

### MTM/VF EIS Alternative Framework

- **Alternative A:** Reflects environmental conditions resulting from agency policies in place prior to the December 1998 settlement agreement (the baseline or no action alternative).
- **Alternative B:** Fills can be permitted in any stream segment (perennial, intermittent or ephemeral), but many new programmatic actions would be implemented to reduce aquatic, terrestrial, and community impact concerns.
- **Alternative C:** Fills would be restricted to intermittent and/or ephemeral stream zones. Similar to Alternative B above, this alternative would also reflect improvements to programs regulating terrestrial and community issue areas. For study purposes, the size of the watershed being evaluated ranges from 0 to 250 acres.
- **Alternative D:** Restricts fills to the ephemeral stream zone and recommends improvements to other baseline regulatory programs governing mountaintop mining operations. For study purposes, the watershed size being evaluated ranges from 0 to 75 acres.

## Mountaintop Mining EIS

### MTM/VF EIS Alternative Framework

- ~70 actions were tentatively identified by the EIS Steering Committee to enhance:
  - inter-agency coordination
  - public health and safety
  - protect environmental values
- These actions involve new/revised:
  - policies
  - guidance
  - interagency agreements
  - regulations
  - laws

## Mountaintop Mining EIS

### Examples of Programmatic Action Items Developed to Minimize Impacts

- **Action 7B:** CWA and SMCRA regulatory authorities will propose rules requiring comprehensive water quality and biological monitoring, tiered to stream segment. The data will assist in the evaluation of direct and/or indirect effects and be used primarily to make permit decisions and to develop mitigation and/or compensation proposals.
- **Action 25:** The Federal and/or state agencies will develop guidance, policies, or rules providing consistent definitions of stream segments as well as field methods for delineating the segments.
- **Action 47:** OSM will develop guidelines for: 1) selecting appropriate growth medium to best support the intended PMLU; 2) reducing soil compaction of the growth medium; 3) using less competitive herbaceous ground cover; 4) selecting tree and shrub species suitable for the approved PMLU; 5) creating standards for measuring success; and 6) utilizing slash and non-harvested forested materials.
- **Action 59:** For those permit applications that include AOC variances and/or mountaintop removal mines, OSM and/or the state SMCRA regulatory authorities could consider developing guidance or policies for establishing financial assurance requirements (e.g., sureties or bonds) to assure development of the infrastructure necessary to support implementation of the approved PMLU.

## Mountaintop Mining EIS

### Current Issues/Options/Schedule

## Mountaintop Mining EIS

### Options

- Publish the draft EIS without recommending a preferred alternative. OSM stream buffer rules could be proposed with options similar to the alternatives being proposed in the EIS. The final EIS and the final rule would select one of the options/alternatives/sets of actions following the public comment period.
- Publish the draft EIS with a statement that OSM prefers Alternative B while the other agencies prefer B, C, D or have no preference pending public comment.
- Publish the draft EIS with a consensus alternative. If Alternative B is selected, which relies upon the regulatory process to minimize impacts, a clear statement must be made that this process will be significantly different than the regulatory process being implemented prior to 1998. Region 3 also recommends that if Alternative B is selected, previously developed terrestrial and PMLU actions must be included as commitments within both the EIS and the OSM rulemaking proposal.



## Mountaintop Mining EIS

### Current Schedule

- |  |                  |
|--|------------------|
| ▪ Working Draft EIS Submitted for Agency Concurrence | Late Spring 2002 |
| ▪ Draft EIS Printing/Filing/Distribution             | Summer 2002      |
| ▪ Public Hearing                                     | Late Summer 2002 |
| ▪ Comment Period Ends                                | Fall 2002        |
| ▪ Final EIS  | TBD              |

## Mountaintop Mining EIS

### Discussion



William Hoffman To: Michael Castle/R3/USEPA/US/EPA  
03/01/02 10:38 AM Subject: EIS Alternatives Pros & Cons

Mike:

Here is an electronic version of what we put together yesterday. It reads better if its launched. Let me know if any changes are needed. I will make copies for Tuesday.

Bill



William J. Hoffman (3E830)  
Environmental Services Division  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-2995

Selection Of A Preferred Alternative	
Pro	Con
<ul style="list-style-type: none"> <li>Provides public with sharpened focal point for review and comment</li> <li>Narrows scope of OSM's Proposed Rulemaking</li> </ul>	<ul style="list-style-type: none"> <li>EIS Status Report (January 1, 2001) stated that no preferred alternative would be selected prior to draft EIS</li> <li>Depending upon alternative selected, will elicit significant negative response from either the environmental community or industry</li> </ul>
Selection of Competing Preferred Alternatives by the Agencies	
Pro	Con
<ul style="list-style-type: none"> <li>Provides agencies latitude in selecting an alternative that aligns with their "mission"</li> <li>Allows OSM's propose Rulemaking to proceed as they envision</li> </ul>	<ul style="list-style-type: none"> <li>Conflicts with agreements made during settlement to present an aligned Federal position</li> <li>Provides mixed message to the public</li> </ul>
Selection of Alternative B (unrestricted watershed, project by project review)	
Pro	Con
<ul style="list-style-type: none"> <li>Relies on regulatory process to minimize impacts</li> <li>Does not sterilize coal reserves (no broad takings issue)</li> </ul>	<ul style="list-style-type: none"> <li>Will appear inconsistent with findings of tech studies, including economics, and with stated purpose of EIS to reduce impacts</li> <li>Terrestrial, PMLU, and minimal impact threshold actions not yet sufficiently developed to select Alt B as an action alternative</li> </ul>
Selection of Alternative C (Restricts fills to intermittent zone ≤ 250 acre watersheds)	
Pro	Con
<ul style="list-style-type: none"> <li>Most consistent with findings of tech studies</li> <li>State SMCRA agencies could perform one stop permitting on majority of mining applications under SPGP</li> </ul>	<ul style="list-style-type: none"> <li>Will push companies toward many small fills, which may have greater cumulative impact</li> <li>Will sterilize several of the lower coal seams at mine sites and eliminate some sites from being economically viable, creating takings claims</li> </ul>

EXHIBIT 18

Selection of Alternative D (Restricts fills to ephemeral zone $\leq 75$ acre watersheds)	
Pro	Con
<ul style="list-style-type: none"> <li>• Least direct impact on the aquatic ecosystem</li> <li>• Most support from the environmental community</li> </ul>	<ul style="list-style-type: none"> <li>• Will force companies toward many small fills, which may have greater cumulative impact</li> <li>• Will sterilize a significant number of coal seams at mine sites and eliminate many sites from being economically viable, generating numerous takings claims.</li> </ul>

William Hoffman To: Rich Kampf/R3/USEPA/US@EPA  
 03/07/02 08:56 AM Subject: One Pager for Whitman/Norton Meeting

See attached- I think I got everything into one page.



William J. Hoffman (3ES30)  
 Environmental Services Division  
 U.S. Environmental Protection Agency  
 1850 Arch Street  
 Philadelphia, PA 19103-2029  
 (215) 814-2998

EXHIBIT 19

# Mountaintop Mining/Valley Fill Environmental Impact Statement

## Background:

In response to a lawsuit filed in 1998, an Environmental Impact Statement (EIS) is currently being prepared by EPA, OSM, FWS, COE, and the State of West Virginia to evaluate programmatic actions to minimize impacts from mountaintop mining/valley fill operations in Appalachia. No agency has formally been designated as the "lead" agency. All are considered "co-leads" in the decision making process. The projected date for completing the draft EIS is August 2002.

## Issues:

- SMCRA, CWA 402, and CWA 404 permits are required for mountaintop mining/valley fill operations. Many state agencies are currently delegated SMCRA and CWA Section 402 permitting authorities, but the Federal government (COE) currently issues CWA 404 permits in Appalachian States. OSM proposes to modify its SMCRA rules to incorporate regulatory procedures similar to those found in the CWA Section 404(b)1 Guidelines, thereby facilitating the development of a one-stop permitting framework within State SMCRA agencies. OSM has not yet shared the proposed rule change language with its partners in the EIS.
- To accommodate the proposed revisions to the SMCRA rules, OSM is recommending that Alternative B (project-by-project reviews, no set restrictions) be designated as the preferred alternative in the EIS. The agencies previously agreed not to designate a preferred alternative in the draft EIS pending receipt of public comment on the issue.

## Talking Points:

- If Alternative B is to be selected, additional incentives to promote reforestation and to insure that post mining land use development occurs as envisioned should be included within both the EIS and the OSM rulemaking proposal. These incentives would minimize impacts identified in the EIS and minimize concerns that would otherwise be expected from the environmental community over the selection of Alternative B.
- EPA requests the opportunity to review and provide input to OSM's proposed rule changes prior to lending its support for either the new rules or for EIS Alternative B.
- A minimum impact threshold should be developed within the EIS for the purposes of resolving the controversy surrounding the COE Nationwide mining permit (NWP 21). This threshold would also clearly establish those projects over which States could assume one-stop permitting responsibility under a CWA 404 State Programmatic General Permit.
- The Council on Environmental Quality should be tasked to resolve any disputes that may arise between the Federal Agencies over the scope and/or direction of the EIS.

William Hoffman  
03/12/02 03:46 PM  
To: Michael Castle/R3/USEPA/US@EPA  
Subject: Re: OSM Action Descriptions

Attached is the memo (with my response at the top) that Dave Hartos sent back in February in which he refers to the deletion of those four action items by "executive fiat". The action items were previously described in the document I sent you dated Oct 23/7777. We do not need to be wedded to the precise wording in those previous descriptions, but deleting them altogether (especially 57 & 58) is going a little too far.

William J. Hoffman (3E630)  
Environmental Services Division  
U.S. Environmental Protection Agency  
1850 Arch Street  
Philadelphia, PA 19103-2028  
(215) 814-2985  
--- Forwarded by William Hoffman/R3/USEPA/US on 03/12/02 03:42 PM ---

William Hoffman  
02/20/02 12:13 PM  
To: Dave Hartos <DHARTOS@OSMRE.GOV>  
cc: bol@mme.state.va.us, Charles.K.Stark@hq02.usace.army.mil, Dave Hartos <DHARTOS@OSMRE.GOV>, dvandals@dep.state.wv.us, jstump@gnnet.com, Katherine.L.Trott@HQ02.USACE.ARMY.MIL, lov@mme.state.vt.us, Mike Robinson <MR08IN50@OSMRE.GOV>, Paul.Rodman@mail.state.ky.us, Rebecca Hammer/R3/USEPA/US@EPA, rhunter@mail.dep.state.wv.us, Kathy Hodgkins/R3/USEPA/US@EPA, Rich Kempf/R3/USEPA/US@EPA, Donald Welsh/R3/USEPA/US@EPA, Gregory Peck/DC/USEPA/US@EPA, Elaine Surland/DC/USEPA/US@EPA  
Subject: Re: OSM Action Descriptions

Dave:

I think you did a great job of consolidating the "essence" of terrestrial action items 43, 45, 47, and 53 into 47. I do think the description should take a more aggressive position that this guidance will be developed however, consistent with the theme of Tier 2.

EPA and the other agencies, to the best of my knowledge, have not yet agreed to delete Actions 57, 58, 59, and/or 62 from the EIS entirely. EPA is especially concerned over the deletion of items 57 and 59, which are designed to ensure that the PMLU for which a variance is issued actually happens. As the PMLU is supposed to be approved based upon satisfying a higher and better use, we believe these actions are necessary to ensure that the higher and better use occurs. While OSM recommends deleting them by "executive fiat", this is still a democracy and we need to talk.

I am available all next week.

Bill

EXHIBIT 20



Cindy\_Thibert@fws.gov

To: William Hoffman/R3/USEPA/US@EPA

Subject: Purpose & need/alternatives write-ups

03/25/02 11:14 AM

FWS is back on-line, so we can return our fax machine to semi-retirement.

On one of our last calls, I was to make sure all of you had an electronic copy of the purpose and need section and alternatives write-up, so you can edit at will. Here they are...

(See attached file: I.A.Purpose of the EIS.wpd) (See attached file: alternativewriteup.wpd)

I.A.Purpose of the EIS.w alternativewriteup.wpd

EXHIBIT 21

## I. PURPOSE AND NEED FOR ACTION

### A. Background

Surface coal mining in the Appalachian coalfield states of Kentucky, Tennessee, Virginia, and West Virginia is conducted by a variety of mining methods and in different topographic settings. For the purposes of this EIS, "mountaintop mining" will be considered to include all types of surface coal mining in the steep terrain of the central Appalachian coalfields. Removal of overburden and interburden (rock above and between coal seams) during mountaintop mining operations results in generation of excess spoil because the broken rock will not all fit back onto the mined area. The excess spoil is typically disposed of in stream valleys in engineered earthen and rock structures known as valley fills.

A number of federal and State agencies regulate mountaintop mining under the authority of several different statutes. The U.S. Office of Surface Mining (OSM) is responsible for the national administration of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), but OSM has delegated the SMCRA regulatory program to all of the Appalachian coalfield States except Tennessee. (For example, in West Virginia the SMCRA regulatory authority is the West Virginia Department of Environmental Protection (WVDEP)). The U.S. Army Corps of Engineers (COE) regulates the discharge of fill material into waters of the United States under Section 404 of the Clean Water Act (CWA). COE authorization of fills can occur either via a Nationwide Permit (for projects that individually or cumulatively have only minimal adverse effects on the aquatic environment) or via individual Section 404 permits. The U.S. Environmental Protection Agency (EPA) regulates point-source discharges to waters under Section 402 of the Clean Water Act, although this program has also been delegated to each of the Appalachian coalfield States. The U.S. Fish and Wildlife Service (FWS) administers the Endangered Species Act, and via the Fish and Wildlife Coordination Act, advises federal regulatory agencies on fish and wildlife resource issues associated with any federally permitted, constructed, or licensed water development projects, and land development projects that affect waters of the U.S.

Increased public and government agency concern about mountaintop mining operations and whether they were being properly regulated emerged in 1997 and 1998. It appeared that the number of these types of operations had increased in recent years in Appalachia, and that more and more valley fills were being proposed/built. Concerned about impacts to fish and wildlife habitats, FWS initiated an informal inventory of the amount of stream impacts resulting from valley fills and sediment ponds in West Virginia, Virginia, and Kentucky. FWS also brought their concerns to OSM and EPA, most notably in an interagency forum in 1997 hosted by EPA, called the Federal Regulatory Operations Group. Out of this meeting, an interagency working team was formed by OSM, EPA, COE, and FWS in early 1998. Several studies were designed to prepare a consistent fill inventory, and evaluate stream impacts, fill stability, and regulatory program inconsistencies in mitigation and other mining program requirements.

Press coverage of public issues with mountaintop mining surfaced beginning in August 1997, in television, periodicals, and newspapers, including *U.S. News and World Report*, ABC's "Night Line" program, as well as the Charleston (WV) *Gazette*, *Washington Post*, *New York Times*, Lexington (KY) *Herald-Leader*, and Louisville *Courier-Journal*. In 1998, OSM initiated an oversight evaluation of how the West Virginia, Kentucky, and Virginia SMCRA delegated

programs were approving coal mines that proposed not to restore to "approximate original contour," a practice that results in more numerous and larger valley fills. Pursuant to Section 402 (National Pollution Discharge Elimination System permit) of the CWA, EPA began to object to the size and location of valley fills because of impacts to streams. EPA and FWS also questioned the applicability and use of the COE Nationwide Permit authority under CWA 404.

In June 1998, West Virginia Governor Cecil Underwood created the "Task Force on Mountaintop Mining and Related Practices" to study the effects of mountaintop mining. The task force was organized into three committees: 1) Impact to the Economy; 2) Impact on the Environment; and 3) Impact on the People. The findings of the task force were published in December 1998. The recommendations included:

- The need for more research on the environmental and economic effects of mountaintop mining.
- Establishment of a state office to regulate the impact of mountaintop removal mining on people.
- Establishment of a nationwide stream mitigation policy.
- Discontinuing of "fish and wildlife habitat" as a postmining land use (PMLU).
- Development of commercial forestland as a preferred PMLU.
- Rigorous enforcement of existing regulatory requirements, including water quality and approximate original contour (AOC) guidelines.

Meanwhile, in July 1998 the West Virginia Highlands Conservancy and several citizens filed a lawsuit against the West Virginia Department of Environmental Protection (WVDEP) and the U.S. Army Corps of Engineers (COE) (*Bragg, et al. v. Robertson, et al.*, Civ. No. 2:98-0636 S.D.W. Va.), alleging that valley fills associated with surface coal mining operations resulted in the loss and degradation of West Virginia streams, and that CWA and SMCRA were being improperly applied. The plaintiffs argued that valley fills, both individually and cumulatively, caused more than a minimal impact to the "waters of the U.S.," and consequently were not eligible for COE authorization via a CWA Nationwide Permit. As part of this claim, the plaintiffs alleged that the COE also violated the National Environmental Policy Act (NEPA), by failing to analyze the adverse and cumulative environmental impacts of valley fills and surface mining activities in West Virginia. In addition, the plaintiffs contended that the practice of valley filling violates the SMCRA "stream buffer zone rule" (30 C.F.R. §16.57), which restricts surface mining operations within 100 feet of an intermittent or perennial stream.

In December 1998, the plaintiffs and the COE, EPA, OSM, FWS and the WVDEP agreed to settle the CWA portion of the case. The settlement agreement requires the agencies to "enter into an agreement to prepare an Environmental Impact Statement ("EIS") on a proposal to consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills." Secondly, the settlement agreement established interim guidelines (pending completion of the EIS) for the evaluation of mountaintop mining permit applications in West Virginia, and requires the agencies to enter into a Memorandum of Understanding to establish an interagency coordination process "to ensure compliance with all applicable federal and state laws and guidance, improve the permit process, and minimize any adverse

environmental effects associated with excess spoil created by mountaintop mining operations in West Virginia," thereby accomplishing a stated goal of "coordinated permit decisions that minimize adverse environmental effects."

To aid in the objective of increased scrutiny of permits, a *Memorandum of Understanding (MOU) Among the USOSM, USEPA, USCOE, USFWS, and WVDEP for the Purpose of Providing Effective Coordination in the Evaluation of Surface Coal Mining Operations Resulting in Placement of Excess Spoil Fills in the Waters of the United States* establishes a process for improving coordination in the review of permit applications. The entire MOU is provided in an appendix to this EIS. The signatory agencies entered into the agreement with the goals of enhancing cooperation and communication in order to ensure compliance with all applicable federal and state laws, improving time lines and predictability of the permit process, and minimizing adverse environmental impacts from surface coal mining operations resulting in placement of excess spoil fills in the waters of the United States. The experiences of the agencies resulting from the increased permit scrutiny have been considered in the development of this EIS. Many of the efforts in this so-called "interim permitting" period identified areas where the agencies, the regulated community, and the environment would benefit from coordinated or clarified procedures, better baseline data collection, improved analysis of potential impacts, and a different sequence of processes.

## B. PURPOSE OF THE EIS

The Notice of Intent to prepare the EIS is provided in the Federal Register, dated February 5, 1999 (64 FR 5778, 02/05/99). The stated purpose for this EIS in this Notice is "to consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills (64 FR 5778, 02/05/99)." The EIS satisfies one of the requirements of the December 23, 1998 Settlement Agreement in the *Bragg* lawsuit described earlier.

Prior to the *Bragg* case settlement, the agencies had determined that comprehensive data on the environmental impacts of mountaintop mining and valley filling did not exist, and had initiated a number of studies to address those data gaps. The findings of those initial studies, as well as additional studies determined to be necessary after initiation of the EIS process, are discussed in detail in this EIS and were used in the development of the EIS alternatives.

## C. PROPOSED ACTION

The EPA, COE, and OSM propose to promulgate final regulations and develop policies or guidance, as necessary, to establish an integrated surface coal mining regulatory program, under consonant application of the CWA and SMCRA. These regulations, policies, and/or guidelines will minimize, to the maximum extent practicable, adverse impacts to waters of the United States and prevent material damage outside the permit area; streamline the permitting process; and, to the extent feasible under present law, implement administration of a comprehensive CWA/SMCRA program by state authorities. This regulatory program will provide for a balance between the nation's need for energy and the protection of environmental resources that could be

adversely affected by mountaintop mining and valley fill operations in the steep slope Appalachian coal fields. The joint SMCRA/CWA program goals envisioned by the rule making proposal will include appropriate mine planning and reclamation; clear regulatory definitions, impact thresholds and guidance on best management practices; adequate baseline data collection; sufficient impact analysis with avoidance and minimization considerations; and suitable levels of mitigation for unavoidable impacts.

#### IV. ALTERNATIVES

A number of environmental and community impact concerns were raised during the EIS scoping sessions and through the public comment process. Various technical studies, symposia, or workshops were conducted to evaluate these scoping concerns; as a result of the evaluation, the scope of the EIS was narrowed, as required by NEPA, to address the most significant issues. These issues have been grouped into eleven general categories:

1. Direct loss of streams and stream impairment
2. Restoration of aquatic ecosystems
3. Cumulative impacts to aquatic and terrestrial habitats
4. Effectiveness of mitigation
5. Threatened and endangered species
6. Blasting, dust, and fumes
7. Deforestation
8. Flooding
9. Benefits of reclaimed land
10. Scenery
11. Government efficiency

The EIS agencies evaluated the State and federal programs regulating steep slope mining activities to identify ways in which the programs could be improved to address the eleven issues and to better coordinate the SMCRA and CWA permit processes. Specific programmatic actions were formulated to address each of the issues, and were grouped into four sets of possible alternatives, labeled A through D, presented in Table XXX [(Mike's "mountaintop mining/valley fill EIS alternative framework overview")]. It should be noted that no alternative has been identified as a "preferred alternative" at this time. The preferred alternative and final set of recommended action items will not be determined until the final EIS is published.

The most significant distinction between the four alternatives is how each one addresses Issue 1, "Direct loss of streams and stream impairment." The question of what portions of a stream can be legally filled under SMCRA authority was central to the *Bragg v. Robertson* lawsuit. The District Court decision in that case established that the SMCRA stream buffer zone regulations at 30 CFR 816.57 and 817.57 do not allow mining activities (including valley fills) within 100 feet of intermittent or perennial streams. The Fourth Circuit Court of Appeals later vacated the District Court's decision, but on grounds unrelated to the applicability of the stream buffer zone rule. Because of the atmosphere of regulatory uncertainty surrounding this issue, and the importance of allowable valley fill size to mine viability and environmental impacts, the agencies developed the EIS alternatives around it. Each alternative proposes different changes to regulatory programs that determine the allowable extent of stream loss through valley filling. The amount of valley filling that is allowable will affect the amount of mining that can occur, which in turn will determine the environmental and economic consequences of selecting a given alternative.

Alternative A, the "no action" alternative, represents the SMCRA and CWA programs as they were being implemented prior to the *Bragg v. Robertson* settlement agreement in December 1998. At that time, there were essentially no limitations on the size, location, or number of valley fills authorized by the regulatory agencies. It is recognized that a number of significant program improvements have been accomplished while the EIS has been in progress, and that additional program changes are currently under consideration by State agencies that are not captured in Alternative A.

Alternative B, while not imposing any predetermined limits on size, location, or number of valley fills, would require a much more detailed analysis of alternatives and environmental impacts. Valley fills could be allowed in any segment of a stream, depending on a thorough, permit-by-permit evaluation of environmental impacts based on site-specific field data. In addition, applicants would have to conduct an alternatives analysis to demonstrate that they have avoided and minimized impacts to waters of the U.S. to the extent practicable. Mitigation within the same watershed would be required for unavoidable impacts.

Alternative C would restrict the location of valley fills to ephemeral and intermittent portions of streams. For purposes of predicting the environmental and economic consequences that would result if this alternative were selected, a 0- to 250-acre watershed size range was used to represent the maximum allowable valley fill size. Like Alternative B, permit applicants would be required to conduct baseline data collection and an alternatives analysis, and provide mitigation for unavoidable impacts.

Alternative D would restrict the location of valley fills to the ephemeral portion of streams. For purposes of predicting the environmental and economic consequences that would result if this alternative were selected, a 0- to 75-acre watershed size range was used to represent the maximum allowable valley fill size. Under this alternative, baseline data collection, alternatives analysis, and mitigation requirements would be less stringent.

Because confusion exists about the extent to which existing SMCRA and CWA regulations can legally permit the placement of excess spoil in streams, Alternatives B, C, and D would all require changes to regulations. OSM is proposing rulemaking to revise the stream buffer zone regulations (30 CFR 816.57 and 817.57) to allow the disposal of excess spoil from steep slope mining operations into streams provided the project has been authorized under the appropriate CWA Section 404 process. EPA and the COE would likewise change existing CWA Section 404 regulations to prohibit the placement of excess spoil in perennial streams (Alternative C) or in intermittent or perennial streams (Alternative D), and establish individual and cumulative "minimal effects" thresholds (Alternatives B, C, and D). The minimal effects thresholds would determine when projects would be eligible for authorization under the Nationwide Permit program and would not be required to apply for an Individual Permit.

In addition, many other programmatic actions are suggested that would reduce aquatic, terrestrial, and community impacts. The agencies specifically solicit comment on the need and appropriateness of all of the suggested action items.

William Hoffman  
03/29/02 07:54 PM

To: Gary Bryant/R3/USEPA/US/EPA  
Subject: Re: DRAFT Report MTM/VF Stream Chemistry

Very well put Gary! 86-0 seems pretty convincing to me, but I only had a couple of statistical courses in college. Don't get discouraged, we can expect more attacks on our findings as we get closer to press time!

Bill

Gary Bryant

Gary Bryant  
03/27/02 04:16 PM

To: jstump@gnnet.com  
cc: William Hoffman/R3/USEPA/US/EPA  
Subject: DRAFT Report MTM/VF Stream Chemistry

Here is an electronic version.

If you have comments on the statistical validity of the comments on selenium, I would welcome them. I called Eric Perry after the call this morning and asked him to check if the statistical query he was looking at included the data from lab 1 and to let me know. He said he would get back to me by tomorrow. As you may have gathered, he had not actually looked at our report until the call this morning. The selenium data clearly show "hot spots" with higher concentrations of selenium in each of the five watersheds and located downstream of "Filled" sites ONLY. There are 66 violations of the stream water quality criteria identified and each is at a Filled site. No other category of site had violations of selenium. I don't believe anyone needs a statistician to prove that MTM/VF mining causes violations of stream criteria for selenium. On top of that, the WV Geologic Survey data indicate that the coals in that region are high in selenium.

Unfortunately, all of our statistical people are out of the office until next week.

finalDRAFTport1.wp finalDRAFTport2.wp  
Gary Bryant

USEPA  
1050 Choptank Street  
Wheeling WV, 26003-2995  
phone 304/234-0230 (FAX 0257)

EXHIBIT 22



William Hoffman To: Gregory Peck/DC/USEPA/US@EPA  
04/16/02 02:08 PM Subject: Update

I put these bullets together to update the RA on where we are on the MTM/VF issue.

  
EISUpdateApril2002.wp

William J. Hoffman (SES30)  
Environmental Services Division  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-2996

#### MTM/VF EIS Status April 15, 2002

It is our understanding that the Administrator was briefed last Monday regarding the fill rule and has indicated that she does not want to sign the rule until several actions are taken to demonstrate that EPA, COE, and OSM are working together to minimize the impacts, namely:

- That the SMCRA stream buffer rule be modified/strengthened to bring the proposal into alignment with EPA's Section 404(b)1 guidelines, and
- That the COE revisit NWP 21 in order to develop a minimum impact threshold to define when individual permit reviews will be undertaken for mining projects.

These issues align with the remaining issues concerning the selection of a preferred alternative in the MTM/VF EIS (Alternative B):

- Alternative B proposes that fills can be placed in any stream segment subject to a rigorous project-by-project environmental review process. Because this alternative relies on a rigorous project-by-project review process, EPA has stated that a minimum impact threshold must be developed for NWP 21 so this review process can be triggered.
- We have suggested that if OSM wishes to continue with the vision of creating a one-stop permitting platform within state SMCRA agencies, the stream buffer zone rule will need to be strengthened by incorporating a biological component into the material damage definition. This would create an adverse impact threshold for permits, and bring the proposal into alignment with EPA's Section 404(b)1 guidelines.

The EIS Steering Committee met last week in an attempt to resolve the issues. While some progress was made in attempting to define a review process for the Section 404 permits, the issue was not resolved. OSM is also still contemplating the approach they want to take with the SMCRA rule proposal (as it relates to adverse impact).

The EIS Steering Committee also discussed a plan for addressing the flaws in the economic study. The Committee agreed to go forward with existing study results, but to qualify the results as likely to have a greater impact on the industry than projected. Examples would be provided to demonstrate why these results are likely to occur, and other studies (Marshall University, mine tech team, etc) would also be used to demonstrate the adverse impacts that have been projected to occur from restricting fills. The flaws would be corrected in the final EIS, and if the findings are other than as expected, a supplemental EIS would be prepared in order to give the public the appropriate opportunity to comment. The only other option is to correct the flaws before issuing the draft EIS, which would delay its release a minimum of four additional months to Fall/Winter 2002.

EXHIBIT 23

## IV. Alternatives

### CHAPTER IV. ALTERNATIVES

#### A. INTRODUCTION

A number of environmental and community impact concerns were raised during the EIS scoping sessions and through the public comment process. Various technical studies, symposia, or workshops were conducted to evaluate these scoping concerns; as a result of the evaluation, the scope of the EIS was narrowed, as required by NEPA, to address the most significant issues. These issues have been grouped into eleven general categories:

1. Direct loss of streams and stream impairment
2. Restoration of aquatic ecosystems
3. Effectiveness of mitigation
4. Cumulative impacts to aquatic and terrestrial habitats
5. Threatened and endangered species
6. Deforestation
7. Blasting, dust, and fumes
8. Flooding
9. Benefits of reclaimed land
10. Scenery
11. Government efficiency

The EIS agencies evaluated the State and federal programs regulating steep slope mining activities to identify ways in which the programs could be improved to address the eleven issues and to better coordinate the SMCRA and CWA permit processes.

To accomplish the goal of the proposed action described in Section A of Chapter I, the following alternatives were developed to consider the full range of response options available to the agencies under existing statutes.

Table IV-A-1. Mountaintop Mining Valley Fill EIS Alternative Summary	
Alternative A	No changes to the SMCRA and CWA programs in effect in 1998
Alternative B	Valley fills could be allowed not only in ephemeral and intermittent stream segments, but could possibly be located in perennial streams—dependent on a detailed, permit-by-permit baseline data collection and thorough, site-specific, significant adverse impact analyses—including consideration of alternatives for avoidance and minimization. Mitigation of unavoidable impacts would require in-kind replacement of aquatic functions and values within the watershed.

#### EXHIBIT 24

Mountaintop Mining / Valley Fill EIS

IV-1

Draft - April 2002

## IV. Alternatives

Alternative C	Valley fills could be located in ephemeral and intermittent streams. Permit-by-permit baseline data collection and site-specific alternatives analyses would be required (although not necessarily as rigorous as in Alternative B) to demonstrate that avoidance and minimization were considered. Mitigation options of unavoidable impacts would be somewhat more varied and thus more flexible than under Alternative A.
Alternative D	Valley fills could be located only in the ephemeral portion of streams. Permit-by-permit baseline data collection would be more limited than under Alternative B, and alternative analyses would be to demonstrate that minimization of downstream or indirect impacts were considered. Mitigation could include compensation in lieu of in-kind replacement of lost aquatic function and value.

#### B. ANALYSIS OF ALTERNATIVES

The most significant distinction between the four alternatives is how each one addresses Issue 1, "Direct loss of streams and stream impairment." The question of what portions of a stream can be legally filled under SMCRA authority was central to the *Bragg v. Robertson* lawsuit. The District Court decision in that case established that the SMCRA stream buffer zone regulations at 30 CFR 816.57 and 817.57 do not allow mining activities (including valley fills) within 100 feet of intermittent or perennial streams. The Fourth Circuit Court of Appeals later vacated the District Court's decision, but on grounds unrelated to the applicability of the stream buffer zone rule. Because of the atmosphere of regulatory uncertainty surrounding this issue, and the importance of allowable valley fill size to mine viability and environmental impacts, the agencies developed the EIS alternatives around it. Each alternative proposes different changes to regulatory programs that determine the allowable extent of stream loss through valley filling. The amount of valley filling that is allowable will affect the amount of mining that can occur, which in turn will determine the environmental and economic consequences of selecting a given alternative.

Alternative A, the "no action" alternative, represents the SMCRA and CWA programs as they were being implemented prior to the *Bragg v. Robertson* settlement agreement in December 1998. At that time, there were essentially no limitations on the size, location, or number of valley fills authorized by the regulatory agencies. It is recognized that a number of significant program improvements have been accomplished while the EIS has been in progress, and that additional program changes are currently under consideration by State agencies that are not captured in Alternative A.

Alternative B, while not imposing any predetermined limits on size, location, or number of valley fills, would require a much more detailed analysis of alternatives and environmental impacts. Valley fills could be allowed in any segment of a stream, depending on a thorough, permit-by-permit evaluation of environmental impacts based on site-specific field data. In addition, applicants would have to conduct an alternatives analysis to demonstrate that they have avoided and minimized

Mountaintop Mining / Valley Fill EIS

IV-2

Draft - April 2002

#### IV. Alternatives

impacts to waters of the U.S. to the extent practicable. Mitigation within the same watershed would be required for unavoidable impacts.

Alternative C would restrict the location of valley fills to ephemeral and intermittent portions of streams. For purposes of predicting the environmental and economic consequences that would result if this alternative were selected, a 0- to 250-acre watershed size range was used to represent the maximum allowable valley fill size. Like Alternative B, permit applicants would be required to conduct baseline data collection and an alternatives analysis, and provide mitigation for unavoidable impacts.

Alternative D would restrict the location of valley fills to the ephemeral portion of streams. For purposes of predicting the environmental and economic consequences that would result if this alternative were selected, a 0- to 75-acre watershed size range was used to represent the maximum allowable valley fill size. Under this alternative, baseline data collection, alternatives analysis, and mitigation requirements would be less stringent.

Because confusion exists about the extent to which existing SMCRA and CWA regulations can legally permit the placement of excess spoil in streams, Alternatives B, C, and D would all require changes to regulations. OSM is proposing rulemaking to revise the stream buffer zone regulations (30 CFR 816.57 and 817.57) to allow the disposal of excess spoil from steep slope mining operations into streams provided the project has been authorized under the appropriate CWA Section 404 process. EPA and the COE would likewise change existing CWA Section 404 regulations to prohibit the placement of excess spoil in perennial streams (Alternative C) or in intermittent or perennial streams (Alternative D), and establish individual and cumulative "minimal effects" thresholds (Alternatives B, C, and D). The minimal effects thresholds would determine when projects would be eligible for authorization under the Nationwide Permit program and would not be required to apply for an Individual Permit.

In addition, many other programmatic actions are suggested that would reduce aquatic, terrestrial, and community impacts. The agencies specifically solicit comment on the need and appropriateness of all of the suggested action items.

For studying the environmental and economic effects of these alternatives in Chapter V, Alternative D assumes the surrogate watershed size for ephemeral streams to be a drainage area less than 75 acres. Stated another way, the toe (i.e., the lowest elevation of the front face) of any valley fill authorized under Alternative D would be located at a point in a stream channel that drains no more than a 75-acre watershed. See Figure IV-1 depicting each alternative on one topographic map with the drainage areas outlined. For study purposes, the watershed size being evaluated for Alternative D ranges from 0-75 acres. Similarly Alternative C assumes valley fills authorized in watersheds no larger than 250 acres. For study purposes, the watershed size being evaluated for Alternative C ranges from 0-250 acres. Alternatives A and B would have no upper limit on the drainage area allowable for valley filling, although the toe locations under Alternative B would be determined project-by-project based upon the commensurate site-specific aquatic values impacted and mitigated

#### IV. Alternatives

*Action 42, 43, 45, 47, 63: OSM, in cooperation with the states and research community, will develop guidelines identifying state-of-the-science, best management practices (BMPs) for: 1) selecting appropriate growth medium from available topsoil, weathered subsoil and underlying overburden, or topsoil substitute and development of the best reclamation plan to best support the intended post-mining land use (PMLU) and/or enhance natural succession or re-establishment of native riparian or wildlife habitat; 2) reducing soil compaction of the growth medium—particularly where trees are intended; 3) using less competitive herbaceous ground cover to encourage tree growth and control erosion; 4) selecting tree and shrub species suitable for the final-graded spoil and the approved PMLU; 5) creating permit-specific or programmatic standards for measuring the success for tree, shrub stocking, and ground cover; 6) utilization of slash and non-harvested forested materials; and 7) maximizing to the extent economically practicable, the commercial recovery of forest products prior to initiating mining activities. OSM will continue its reforestation initiative through education, training, technology transfer, and cooperation between OSM, states, industry, researchers, and landowners on the benefits and methods to effectively and economically reclaim to trees.*

The EIS and other studies report concerns for forest fragmentation and ecosystem conversion from forestland to grassland. The literature concludes that reclamation with trees on mountaintop mining sites has not been particularly successful due to over-compaction, competition with trees from grasses and legumes planted for erosion control, and grazing wildlife. Research has also shown that mine sites revegetated with a growth medium of topsoil substitutes impede natural succession and re-establishment of similar habitat as pre-mining condition. However, the literature also demonstrates appropriate techniques are available to promote reforestation, where desired as the post-mining land use. Other successful reclamation techniques have successfully demonstrated wildlife enhancement measures.

Section 515 (b)(2) of the Surface Mining Control and Reclamation Act (SMCRA) requires operators to "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses...." Section 515(b)(24) and the federal regulations at 30 CFR 816.97 and 817.97 also require operators to, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values and to achieve enhancement of such resources where practicable.

While deforestation and fragmentation are concerns, SMCRA provides no mandate that mined land be returned to forest. SMCRA leaves the choice of PMLU to the landowner and mining company—so long as the use is higher or better than pre-mining conditions. The SMCRA program has not proscribed detailed techniques necessary to meet these reclamation performance standards because of the wide diversity of conditions throughout the nation's coalfields. However, reclamation science and practice have documented many successful techniques and methods for achieving revegetative success and enhancing wildlife and ecosystem re-establishment. A compendium of the "best science" in reclamation technology would be extremely useful to permit development and on-the-ground improvements.

9-281/8-33



Benjamin Tuggle  
05/17/02 08:11 AM  
To: Diane Bowen/ARL/R9/FWS/DOI@FWS  
cc: Robin Nims/Elliott/ARL/R9/FWS/DOI@FWS  
Subject: Senior Executive Conference Call-3pm Tuesday 5/21

Diane,

This is a FYI, call State College and find out this is all about please. I'm going to be out next week so we have to put together a game plan to get us coverage. Thanks.

BNT

----- Forwarded by Benjamin Tuggle/ARL/R9/FWS/DOI on 05/17/2002 08:05 AM -----



"Mike Robinson" <MROBINSO@OSMRE.E.GOV>  
05/16/2002 05:15 PM  
To: <Castle.Michael@epa.gov>, <chodkiss.kathy@epamail.epa.gov>, <Hoffman.William@epamail.epa.gov>, <Pack.Gregory@epamail.epa.gov>, <Surnano.Samir@epamail.epa.gov>, <Benjamin.Tuggle@fws.gov>, <Cindy.Tibbitts@fws.gov>, <Dave.Sansmores@fws.gov>, <Charles.K.Stack@hq2.usace.army.mil>, <Katherine.L.Trotter@HQ2.USACE.ARMY.MIL>, <James.M.Lowne@hq2.usace.army.mil>, <dvanedelinde@mail.dep.state.wv.us>, <thunter@mail.dep.state.wv.us>  
cc: "Al Klein" <AKLEIN@OSMRE.GOV>, "Dave Harto" <DHARTOS@OSMRE.GOV>, "Jeff Coker" <JCOKER@OSMRE.GOV>  
Subject: Senior Executive Conference Call-3pm Tuesday 5/21

I'm attempting to follow up from our CEQ meeting discussion yesterday--i.e., where an issue resolution process was proposed to have the SESers of our respective federal agencies (and Matt Crum from WVDEP) meet with the Steering Committee. This first meeting/call wouldn't be to resolve issues, but to develop a process to see how and when our executives want the Steering Committee to present the issues we can't seem to resolve.

Inasmuch as our principals may be meeting next Wednesday at the Deputy Secretary of Interior's office, I thought it would be good to at least say we had started developing the process for raising issues up for executive/principal direction back to us. I propose we use the same dial-in number per usual--877.216.4412, access code 866654#

I've been asked by Al Klein to contact your regional directors, administrators, etc. and see if we can have this subject call next week. I've already contacted Mamie Parker and Sam Hamilton's office for FWS; Matt Crum's office; Chip Smith at COR HQ, and EPA RII Administrator's office. Most have seemed to be available so far, but still need confirmation on a few. I am also trying to get HQ Policy folks on the call (e.g., Mary Joia Blanchard from OSM, Dan Wayland/Greg Beck, (both OSM)/Ann Miller "OSM" from EPA, Benjamin Tuggle (FWS), and whomever from the COR (Chip?). Stay tuned.

P.S. It has been suggested that we hold the meeting with Arch Coal and Potomac week after next in Wheeling--no date yet.

EXHIBIT 25

From: "Mike Robinson" <MROBINSO@OSMRE.GOV>  
To: <dvanedelinde@mail.dep.state.wv.us>  
Date: Fri, May 17, 2002 6:13 AM  
Subject: Re: Principals meeting

Dave, Matt--I received word (second hand through Glenda Owens) from Deputy Secretary Griles' office that the principals' meeting next Wednesday will be a conference call. While I have no further details regarding the time and length of the call, they said that Holly Hopkins, Steve Griles' assistant will be contacting WVDEP and the other agencies with the information. She's at 202.208.6593. If/when I hear more particulars, I'll pass them along.

>>> "DAVE VANDE LINDE" <dvanedelinde@mail.dep.state.wv.us> 05/15/02 03:26PM >>>  
Mike;

After speaking to Matt this morning it is my understanding that neither Matt Crum nor Mike Callaghan have received an invitation to the principals meeting yet. Will WVDEP be included in the meeting? I would like for them to get a little advance notice if they are expected to attend. Is it still set for the May 19th?

David L. Vande Linde  
West Virginia Department of Environmental Protection  
Division of Mining and Reclamation  
10 McJunkin Rd  
Nitro, West Virginia 25143-2506  
Ph. (304) 759-0510; Fax (304) 759-0526  
E-mail: dvanedelinde@mail.dep.state.wv.us

CC: <mcum@mail.dep.state.wv.us>, "Al Klein" <AKLEIN@OSMRE.GOV>, "Glenda Owens" <GOWENS@OSMRE.GOV>

Attachment(s):  
Attachment File 1.822

EXHIBIT 26



**U.S. Department of the Interior**  
**OFFICE OF THE DEPUTY SECRETARY**  
 1849 C Street, NW  
 Washington, DC 20240

Fax: (202) 208-1873  
 Phone: (202) 208-6291

DATE: May 17, 2002

TO: Jeff Jarrett/Pat Ben Grumbles/Lori  
 Steve Williams/Clairetta Michael Callaghan/Jodie  
 Dominic Izzo/Valerie Bill Leary

FAX: 219-3106 564-0488  
 208-6965 304-558-6576  
 703-697-7401 456-6546

FROM: Steve Griles, Deputy Secretary

Number of Pages (including cover): 1

The purpose of this fax is to confirm that the 30-minute conference call to discuss the Mountain Top Mining/Valley Fill EIS is scheduled for Wednesday, May 22, 2002, at 2 p.m.

The call-in number is 202/482-7305 - the access code is 1057.

Each participant in the conference call needs to call 202/482-7305. When the system answers, you will hear a tone. During the tone enter the Access Code. Caller is now connected.

If you have any questions, please call Doris Johnston at 208-6291.

The document accompanying this Facsimile Transmission Sheet is intended only for the use of the individual or entity to which it is addressed. This message contains information which may be privileged, confidential or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, copying or distribution, or taking any action in reliance on the contents of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by the number above.

EXHIBIT 27



U. S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

CONFIRMATION NUMBER: (202) 514-2701

FAX NUMBER: (202) 514-0557

NO. OF PAGES: 2 (INCLUDING COVER PAGE)

DATE: 5-22-02 / 3:30 PM

TO: STEVE GRILES

TELEPHONE NO.:

FAX NO.: 208-1873

FROM: JOHN CRUDEN, DAAV 514-2718

MESSAGE:

STEVE - AS I PROMISED,  
 ATTACHED IS THE  
 SPECIFIC PARAGRAPH FROM  
 THE 1998 AGREEMENT  
 (APPROVED BY THE COURT)  
 CONCERNING THE EIS.

I WILL FOR THE ENTIRE  
 AGREEMENT TO YOU  
 WHEN I RECEIVE IT.

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS  
 RECEIVING THESE PAGES.

EXHIBIT 28

05/22/02 16:04 FAX 2025140857

ENRD/OAAG

0001

Cruden, John

From: Young, Russell  
Sent: Wednesday, May 22, 2002 4:13 PM  
To: Cruden, John  
Cc: Gresham, Leila; Ward, Mary Beth; Nitzynski, Mark  
Subject: John - Gregg settlement agreement language

Here is the term we discussed from the 1998 settlement agreement:

7. The U.S. Environmental Protection Agency ("EPA"), the U.S. Army Corps of Engineers ("Corps"), the Office of Surface Mining ("OSM"), and the U.S. Fish & Wildlife Service ("FWS") (collectively the "Federal Agencies") and the State of West Virginia Department of Environmental Protection ("WVDEP") will enter into an agreement to prepare an Environmental Impact Statement ("EIS") on a proposal to consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by the size and location of success spoil disposal sites in valley fills. The parties intend that the EIS will be completed no later than 24 months after the effective date of this Settlement Agreement.

05/22/02 16:02 FAX 2025140857

ENRD/OAAG

0001



U. S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

CONFIRMATION NUMBER: (202) 514-2701

FAX NUMBER: (202) 514-0857

NO. OF PAGES: (INCLUDING COVER PAGE)

DATE: 5-22-02 / 5:45 PM

TO: STEVE GRULES

TELEPHONE NO.:

FAX NO.:

FROM: JOHN CRUDEN, OAAG

MESSAGE:

STEVE

ATTACHED ARE THE

FOLLOWING:

• 1998 SETTLEMENT AGREEMENT

• 1999 MOU WITH EPA, OSM, COE, FWS, STATE

• PROTONS OF DISTRICT COURT

DECLINING DISMISSAL

SETTLEMENT AGREEMENT



U.S. DEPARTMENT OF JUSTICE  
Environment and Natural Resources Division

John C. Cruden  
Deputy Assistant Attorney General

MEDIATELY IF YOU HAVE ANY PROBLEMS

500 Pennsylvania Avenue, N.W.  
Room 2704

Telephone  
Fax

202-514-2718  
202-514-2571

From: <Hoffman.William@epamail.epa.gov>  
 To: Mike Robinson <MROBINSO@OSMRE.GOV>  
 Date: Mon, Jun 10, 2002 1:47 PM  
 Subject: Re: EIS Steering Committee Conference Call: Today (6/10) 1 p.m.

Here is my list, which is just my stab at it. Mike Castle or others within EPA may have additional thoughts as we move along, but here's a stab at it. Based on what I've heard on the call so far concerning OSM's desire to pull actions dealing with improved data collection etc out of the EIS--and that it is now a CWA EIS rather than a SMCRA EIS--it sure seems like there are new issues that have arisen since the principles meeting a week or so ago.

(See attached file: EPA EIS Issues.vpd)

William J. Hoffman (3ES30)  
 Acting Director, Office of Environmental Programs  
 Environmental Services Division  
 U.S. Environmental Protection Agency  
 1650 Arch Street  
 Philadelphia, PA 19103-2029  
 (215) 814-2965

Mike Robinson  
 <MROBINSO@OSMREG> To: Michael Castle/R3/USEPA/US@EPA, David  
 O'V> Rider/R3/USEPA/US@EPA, Elaine  
 Suriano/DQ/USEPA/US@EPA, Kathy  
 06/10/02 10:28 AM Hodge/R3/USEPA/US@EPA, William  
 Hoffman/R3/USEPA/US@EPA,  
 Cindy\_Tibbott@fws.gov, dave\_donmore@fws.gov,  
 Charles\_K.Stark@hq02.usace.army.mil,  
 Katherine.L.Trot@HQ02.USACE.ARMY.MIL,  
 James.M.Townsend@hq02.usace.army.mil,  
 d.vandell@dep.state.wv.us,  
 hunter@mail.dep.state.wv.us  
 cc:  
 Subject: EIS Steering Committee Conference  
 Call: Today (6/10) 1 p.m.

In preparation for next week's issue resolution meeting with senior executives, we need to develop an agenda and background material to get to everyone by week's end. Bill Hoffman, you indicated that you have a document outlining the issues developed for your management. If appropriate, and you are willing to share with everyone for the call, please forward to the gang.

For your consideration until the call: From the principals' discussion,

EXHIBIT 29

I gather we may be back to the drawing board. CEO believes we must first identify the purpose of this NEPA document (other than to fulfill the settlement agreement). I.e., what government actions do we want to occur to resolve the MTM controversy. These actions (e.g., what may specifically be intended by the agencies in a record of decision following the final EIS--not some indefinite "future" possible actions) will dictate the alternatives and thus the data necessary to analyze the environmental and economic effects of the alternatives.

I realize that some folks on the Steering Committee think that the alternatives we have are not appropriate. Well, it's time to suggest definitive "alternatives" to the alternatives if you don't like the ones we have now--based on some overall unified federal purpose to take actions to resolve the MTM controversy. For example, WVDEP has said the EIS should shift to be more programmatic--what does that translate into as far as federal actions and alternatives? Some have said the alternatives need to just be mining or no mining, others suggest, post-Haden II that file "with a purpose" ought to be part of the framework. I think the federal government's position, post-Haden II is that we think the CWA and SMCRA do allow file in WOUS--with proper analysis, avoidance, minimization, and mitigation when all else fails. So, what master plan of actions do we need to take to integrate the various federal jurisdictions into an efficient, coordinated decision making process? We probably have most of the actions identified, but not nailed down adequately. We've tried "difficulty of implementation," "watershed size," "stream segment," and discussed numerous other frameworks. We at OSM had some "fresh eyes" look at the current alternative framework and they thought we had two distinct categories of alternatives--those to coordinate decision making and those that minimize impacts. Can we have multiple alternatives? Could each agency have their own set?

What does this EIS need to accomplish? Coordinated decision making to minimize impacts to WOUS and other environmental resources.... Then the COE must clearly define the CWA 404 data/analyses (stream protocol and impact prediction) requirements; minimal impact threshold for NWP/IP demonstration; how to value streams and acceptable mitigation to offset unavoidable impacts? If EPA thinks the water quality changes from coal mining and other earth moving activities are unacceptable, what does EPA want to do to assure pollution-intolerant species are unimpacted? New WQ standards? If FWS believes Section 7 consultation/coordination aren't working and we don't want to have duplication of effort between SMCRA coordination and CWA 404 permit consultation, what is needed? The answers to these questions lead us to the appropriate alternative framework.

Once CWA and ESA framework to regulate coal mining are galvanized, then (and only then) can OSM attempt to be the "platform" for coordinated decision making. Until the government actions by each agency other than OSM are decided, our vision is off of the table and must become "future actions" that may necessitate rulemaking. We cannot change our buffer zone rule unless we know the CWA target. We can't collect 404(b)(1) guideline information/analyses until COE decides how to do something it has never done before as part of coal mining requirements for NWP or IPs.

If our framework changes, then the data necessary to analyze the alternatives may change. We may not need to "fix" the economics and cumulative impact studies, but address these areas in some other manner. Our principals were supposedly pretty adamant that they don't want to spend \$1 M to fix studies. Is there some other general approach to satisfy NEPA in these areas...Keep thinkin'.....

Please dial the normal conference number at 1pm today 877.216.4412, access code 869654#.

CC: <Charles.K.Stark@hq2.usace.army.mil>, <Cindy\_Tibbott@fws.gov>, <dave\_danmore@fws.gov>, <vader.david@epamail.epa.gov>, <dwardelinde@mail.dep.state.wv.us>, <suriesto.elaine@epamail.epa.gov>, <James.M.Townsend@hq2.usace.army.mil>, <Katherine.L.Trott@hq2.usace.army.mil>, <hodgkiss.kathy@epamail.epa.gov>, <Castle.Michael@epamail.epa.gov>, <hunter@mail.dep.state.wv.us>

## EPA ISSUES- MTM/VF EIS

- There is no lead agency for the EIS. A lead agency should be designated and/or a dispute resolution process instituted to resolve issues.
- The phase 1 economics study may be flawed. This data has been used in subsequent studies (phase 2, GP economics analysis, and cumulative impacts analysis). If flawed, the subsequent inaccuracies in the phase 2, GP economics analysis, and CIA studies complicates any comparison or selection of alternatives, necessitating additional analyses prior to issuance of an EIS. Decisions must be made to either patch or qualify the current studies and put the draft EIS out while revisions are being made for the final EIS, or to delay issuance of the draft EIS until the revisions can be made. Additional funding will need to be secured to undertake the revisions.
- If Alternative B is to be selected, which promotes a more rigorous regulatory review process, a minimum impact threshold must be developed for the purposes of triggering a more rigorous permit review process under CWA Section 404. This threshold could also be used to establish which projects States could assume one-stop permitting responsibility under a CWA 404 State Programmatic General Permit (SPGP). The direct and indirect aquatic impacts from MTM/VF operations are arguably more than minimal, complicating the NWP 21 issue and SPGP development.
- Post Mining Land Use (PMLU) studies suggest that, in general, post-mining development has not occurred as envisioned when variances are requested from the requirements to return the land to a condition capable of supporting its prior use. Actions to ensure that PMLU development occurs as envisioned have been developed, and must be included as commitments within the EIS. These incentives are especially important if the ruling in the recent KY lawsuit is upheld.
- Cumulative terrestrial impacts from MTM/VF activities are considered to be significant, and have a high level of public interest. Incentives to promote reforestation have been developed and must be included as commitments within the EIS.



From: <Dave.Densmore@fws.gov>  
To: <HOFFMAN.WILLIAM@epamail.epa.gov>, <Rider.David@epa.gov>, <Suriانو.elaine@epa.gov>, <Diane.Bowen@fws.gov>, <KATHERINE.L.TROTT@HQ02.USACE.ARMY.MIL>, <dvandelinde@mail.dep.state.wv.us>, <rhunter@mail.dep.state.wv.us>, <dhartos@osmre.gov>, <mrobinso@osmre.gov>, <JCOCKER@OSMRE.GOV>  
Date: Wed, Jun 12, 2002 10:06 AM  
Subject: FWS EIS ISSUES

Folks:

A quick summary of FWS "issues" for discussion and/or inclusion in next week's agenda. I put these in the form of questions as they might be portrayed on the agenda:

1. Purpose: Do we all agree that the Purpose of this document (in the NEPA sense) remains as stated in previous drafts? If we agree that it is, fundamentally, to "develop coordinated decisionmaking to minimize impacts," what is the relative emphasis placed on "decisionmaking" versus "minimizing impacts"?
2. Alternatives: Based on recent events, do we need to change the framework for EIS alternatives? Can we all agree on what it will be? If we agree on the framework, do we identify a preferred alternative in the DEIS, and which one will it be?
3. Nationwide Permit Thresholds: If we are going to identify an alternative that does no more than refine the permit process, but places no absolute restrictions on mining (ie, an Alternative "B" scenario), do we also include a 404 permitting process that recognizes that some projects have more than minimal effects, and therefore will require an individual permit? If so, what threshold will we use?
4. Terrestrial Impacts: At this point, the EIS alternatives/actions focus almost exclusively on regulating aquatic impacts, with essentially no proposals to minimize terrestrial (ie, forest) losses. Does OSM have the authority through SMCRA to minimize such effects by setting appropriate performance standards for mine design and reclamation?
5. Flaws identified in the GIS/economic/cumulative effects models: Do we stick to the planned August 2002 DEIS publication date, and include greatly qualified study results, or do we take 6-8 months longer and spend more money to run some fixes of these studies, and publish a more defensible document? Will changes to the alternatives framework affect this decision?
6. What process do we follow to resolve disagreements on any of the above?

Needless to say, we probably can't get through all of these in a day, so we will need to decide which of these (and those of the other agencies) might be controlling the process, and start there.....

DD.

EXHIBIT 30

#### Al Klein - EPA Expectations

From: <Rider.David@epamail.epa.gov>  
To: <DHARTOS@OSMRE.GOV>  
Date: 6/14/2002 7:03 AM  
Subject: EPA Expectations  
CC: <Hodgkins.Kathy@epamail.epa.gov>, <Hoffman.William@epamail.epa.gov>, <Rider.David@epamail.epa.gov>, <dave.densmore@fws.gov>, <Charles.K.Stark@hq02.usace.army.mil>, <Katherine.L.Trott@hq02.usace.army.mil>, <dvandelinde@mail.dep.state.wv.us>, <rhunter@mail.dep.state.wv.us>, Al Klein <AKLEIN@OSMRE.GOV>, Jeff Coker <JCOCKER@OSMRE.GOV>, Mike Robinson <MROBINSO@OSMRE.GOV>, <Suriانو.Elaine@epamail.epa.gov>

Dave Hartos,  
In response to your request for Agency major expectations for the agenda:

We fully support the present purpose statement.

#### EPA Expectations of the EIS

Cumulative terrestrial impacts from MTM/VF activities are considered to be significant, and have a high level of public interest. Incentives to promote reforestation have been developed and must be included as commitments within the EIS. Post Mining Land Use (PMLU) studies suggest that, in general, post-mining development has not occurred as envisioned when variances are requested from the requirements to return the land to a condition capable of supporting its prior use. Actions to ensure that PMLU development occurs as envisioned have been developed, and must be included as commitments within the EIS. These incentives are especially important if the ruling in the recent KY lawsuit is upheld. Nationwide Permit Thresholds: We feel NWP 21 minimal impact thresholds to delineate surface coal mining excess spoil discharges in waters of the U.S. (individually and cumulatively) are required. Consistent definitions of stream segments (ephemeral, intermittent, perennial) and field methods for delineating the segments are necessary. A CWA and SMCRA permit coordination process should be instituted through formal MOU to evaluate joint permitting interests on a watershed basis.

Current Contracts:  
It is my understanding that the current contracts end on 8/27/02. New work could be added only if a modification is processed by mid-July (there has to be reasonable opportunity to be able to complete the work by 8/27/02). A 90-day "extension" possibility (to 11/27/02) is a continuity-of-service clause which means the work that could have been performed within the contract period was delayed due to circumstances beyond the control of either the contractor or EPA. There are no prospects to extend beyond 11/27/02 and any new contracts are uncertain at this time.

EXHIBIT 31

file://C:\Documents%20and%20Settings\aklein\Local%20Settings\TEMP\GW\00007.HTM 7/14/2003



William Hoffman  
06/14/2002 10:54 AM

To: dthart@osmre.gov, mrobinso@osmre.gov,  
Dave\_Denamore@fws.gov, Cindy\_Tibbott@fws.gov,  
rhunter@mail.dep.state.vv.us, dvandell@dep.state.vv.us,  
Katherine.L.Tyott@HQ02.USACE.ARMY.MIL,  
Charles.K.Shark@HQ02.USACE.ARMY.MIL  
cc: Kathy\_Hoogkies@R3/USEPA/US@EPA, Michael  
Caster@R3/USEPA/US@EPA, Rich\_Kemp@R3/USEPA/US@EPA,  
Gregory\_Peck@DC/USEPA/US@EPA, David  
Rider@R3/USEPA/US@EPA  
Subject: EPA Expectations/Disputed Actions

This supplements/amends Dave Rider's previous submission:

#### EPA Expectations

EPA continues to support the original purpose for the EIS as stated in the Federal Register Notice of Intent. Our expectation is for the EIS to evaluate the environmental effects of mountaintop mining/valley fill activities, and to develop specific programmatic responses designed minimize or avoid the impacts that have been identified.

#### Disputed Actions

- Cumulative terrestrial impacts from MTM/VF activities are considered to be significant, and have a high level of public interest. Incentives to promote reforestation have been developed and must be included as commitments within the EIS.
- Post Mining Land Use (PMLU) studies suggest that, in general, post-mining development has not occurred as envisioned when variances are requested from the requirements to return the land to a condition capable of supporting its prior use. Actions to ensure that PMLU development occurs as envisioned have been developed, and must be included as commitments within the EIS. These incentives are especially important if the ruling in the recent KY lawsuit is upheld.
- Nationwide Permit Thresholds: We believe NWP 21 minimal impact thresholds to delineate surface coal mining excess spoil discharges in waters of the U.S. (individually and cumulatively) are required.

#### EIS Contract Status

The current period of performance on the current EIS Delivery Orders (2) expire on 8/27/02. New work/dollars can be added to one of those Delivery Orders if a modification is developed by July 1, 2002 and processed by mid-July (there has to be reasonable opportunity to be able to complete the work by 8/27/02). A 90-day "extension" possibility to 11/27/02 exists if it can be shown that the work was delayed due to circumstances beyond the control of either the contractor or EPA. There are no prospects to extend beyond 11/27/02 under the existing EPA NEPA contract and the date for entering into a new "mission" contract is uncertain at this time.

William J. Hoffman (SES30)  
Acting Director, Office of Environmental Programs  
Environmental Services Division  
U.S. Environmental Protection Agency

EXHIBIT 32

Steven Naugeboren  
06/18/2002 11:56 AM

To: Elaine Suriano/DC/USEPA/US, Susan Lepow/DC/USEPA/US, Cathy  
Winer/DC/USEPA/US, Gregory Peck/DC/USEPA/US, John  
Goodin/DC/USEPA/US, James Havard/DC/USEPA/US  
cc: Subject: Agenda and handout for 6/18 SES Issue Resolution Mtg. on  
MTM/VF EIS

This is the first I've heard of a meeting this week on mountaintop mining. I'm on travel all week (checking messages during a break). Elaine and Greg/John - could you please let Cathy Winer and Susan Lepow know the context and details for this meeting. thanks.

Elaine Suriano  
06/17/2002 03:27 PM

To: Steven Naugeboren/DC/USEPA/US@EPA  
cc:  
bcc:  
Subject: Agenda and handout for 6/18 SES Issue Resolution Mtg. on MTM/VF EIS

FYI - info to be discussed on 6/18.

Elaine Suriano  
Office of Federal Activities  
Environmental Scientist  
Ph-202/564-7162, Fx-564-0072

US EPA (2252-A)  
1200 Penna Ave., NW  
Washington DC 20460-0001

--- Forwarded by Elaine Suriano/DC/USEPA/US on 06/17/02 03:26 PM ---

Mike Robinson <MROBINSO@OSMRE.GOV>  
06/14/02 02:10 PM

To: Michael Caster/R3/USEPA/US@EPA, Rich Kemp/R3/USEPA/US@EPA, David Rider/R3/USEPA/US@EPA,  
Elaine Suriano/DC/USEPA/US@EPA, Kathy Hoogkies/R3/USEPA/US@EPA, William  
Hoffman/R3/USEPA/US@EPA, Cindy Tibbott@fws.gov, Dave Denamore@fws.gov, Diane Bowen@fws.gov,  
mattie\_jarke@fws.gov, Charles.K.Shark@HQ02.usace.army.mil, Karen Durham-Aguilera@HQ02.usace.army.mil,  
Katherine.L.Tyott@HQ02.USACE.ARMY.MIL, James.M.Townsend@HQ02.usace.army.mil,  
dvandell@dep.state.vv.us, mcrrun@mail.dep.state.vv.us, rhunter@mail.dep.state.vv.us, Al Klein  
<AKLEIN@OSMRE.GOV>, Dave Hartos <DHARTOS@OSMRE.GOV>, Jeff Coker <JCOKER@OSMRE.GOV>,  
Mary Josie Blanchard <MBLANCHA@OSMRE.GOV> cc: Subject: Agenda and handout for 6/18 SES Issue

EXHIBIT 33

Resolution Mtg. on MTM/VF EIS

Please see attached WP document in preparation for next week's meeting, as discussed in earlier (6/10 12:39 p.m.) e-mail.

6.18 Issue Res Mtg.wpt

DRAFT - This document is a pre-decisional draft document that has been prepared merely for discussions among the agencies preparing the MTM/VF EIS. This document should not be released under the FOIA in that it will (1) confuse the public and (2) stymie open dialogue between government staff who are jointly preparing the MTM/VF EIS. Page 1

**Mountaintop Mining/Valley Fill Environmental Impact Statement**  
**Senior Executive Issue Resolution Meeting**  
Interior South Building Room 332  
June 18, 2002

**PROPOSED AGENDA**

- 9:00 a.m. Introductions
- 9:10 a.m. Purpose of Meeting
- Issue Resolution
  - DEIS Direction
  - Alternative Framework
  - Lead Agency
- 9:15 a.m. Obligation under Bragg Settlement Agreement to Continue with the EIS
- 9:20 a.m. Agency Expectations for DEIS Accomplishments
- 9:50 a.m. Likely Criticism of DEIS by Public
- Public expectations for solutions and better definition of regulatory concepts after 3+ years not met
  - May criticize for not addressing all mining activities or all resource impacts
  - Does not drive quicker implementation of needed government actions to solve MTM controversy (will require time and \$ for additional studies and NEPA documents)
- 10:00 a.m. Issues with Existing Alternative Framework
- No Steering Committee consensus
  - Flawed technical studies
  - Disagreement within Steering Committee on scope of analysis
  - Haden II decision

DRAFT - This document is a pre-decisional draft document that has been prepared merely for discussions among the agencies preparing the MTM/VF EIS. This document should not be released under the FOIA in that it will (1) confuse the public and (2) stymie open dialogue between government staff who are jointly preparing the MTM/VF EIS.

Page 2

**Mountaintop Mining/Valley Fill Environmental Impact Statement**  
**Senior Executive Issue Resolution Meeting**  
 Interior South Building Room 332  
 June 18, 2002

**PROPOSED AGENDA (cont'd.)**

**10:15 a.m. Proposed New Alternative Framework**

- Summary Description of Concept (see handout)
- Discussion of Baseline (no action) Alternative
  - ✓ Pre-Haden I decision (majority position)
  - ✓ Post-improvements (new NWP 21, Fill Rule, etc.)
- Advantages of the new framework:
  - ✓ Retains work to date without reopening scoping
  - ✓ Allows completion of EIS in shorter time frame
  - ✓ Should not require additional contracting resources
  - ✓ Relies on EIS studies as *indicators* for preferred alternatives instead of seeking *absolutes* requiring additional study
  - ✓ Provides for each action agency to select areas for implementing improvements
- Disadvantages of new framework:
  - ✓ A minority of members feel that the new framework does not meet the NEPA requirements by providing a contrasting choices among several clear and distinct viable alternatives

**10:45 a.m. Areas of Potential Disagreement on New Alternative Framework**

- Option 1 - Appear in Alternative B, but is action agency's decision to place in Alternative C
- Option 2 - Action agency's decision whether to appear at all (in Alternative B)
- Option 3 - Actions in Alternative C are based on majority vote
- Actions were there is no statutory authority
- Brief description of terrestrial, post mining land use and AML funds use actions where disagreement exists

**11:05 a.m. EIS Leadership Role**

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Page 3

**Mountaintop Mining/Valley Fill Environmental Impact Statement**  
**Senior Executive Issue Resolution Meeting**  
 Interior South Building Room 332  
 June 18, 2002

**PROPOSED AGENDA (cont'd.)**

**11:15 p.m. EIS Schedule**

- Schedule in consideration of logistics, court decisions and public expectations
- Contractual Concerns

**11:30 a.m. Next Steps**

- Formalization of Issue Resolution Process
- EIS Steering Committee Assignments
- Evaluate Schedule for Principals' Meeting (if necessary)
- Schedule Next Issue Resolution Group Meeting

**12:00 p.m. Adjourn; Working Lunch to Continue Discussion; Lunch Break; or Convene Steering Committee for Follow-up Discussion**

DRAFT - This document is a pre-decisional draft document that has been prepared merely for discussions among the agencies preparing the MTM/VF EIS. This document should not be released under the FOIA in that it will (1) confuse the public and (2) stymie open dialogue between government staff who are jointly preparing the MTM/VF EIS. Page 4

## HANDOUT FOR SES/STEERING COMMITTEE ISSUE RESOLUTION MEETING

### I. Refresh on Teleconference Meeting Decisions

Mountaintop Mining/Valley Fill  
Environmental Impact Statement  
Issue Resolution Process Conference Call  
May 21, 2002--3:00 p.m.

### MEETING NOTES--Page 1

#### Roll Call/Introductions

#### Statement of conference call objective-Initiate Issue Resolution Process

Formation of issue resolution working group (the group on this call is too large to be effective); what size group should engage?

*Decision*—1 SES voting members from each agency with support from:

- EIS Steering Committee (EISSC);
- 1 NEPA member from EPA, OFA;
- Facilitator preferable

#### Process Discussion:

- Reaching consensus/majority?

*Decision*—consensus approach; one vote per agency for decision making on issue resolution (all decisions are subject to principal ratification)

- How are issues presented/resolved?

*Decision*—

- EISSC prepares position papers
- EISSC presents position papers to SES/Policy group
- EISSC answers questions/discusses; can convene to SC meeting in breakout room (if necessary); available for call-back

DRAFT - This document is a pre-decisional draft document that has been prepared merely for discussions among the agencies preparing the MTM/VF EIS. This document should not be released under the FOIA in that it will (1) confuse the public and (2) stymie open dialogue between government staff who are jointly preparing the MTM/VF EIS. Page 5

Mountaintop Mining/Valley Fill  
Environmental Impact Statement  
Issue Resolution Process Conference Call  
May 21, 2002--3:00 p.m.

### MEETING NOTES--Page 2

- SES/Policy Group discusses issues; develops executive direction or assignment to EISSC for more analysis, documentation, or development of issue paper for principals; conveys to EISSC next steps

- How soon/often/where to meet?

*Decision*—

- 1<sup>st</sup> meeting: face-to-face off-site meeting (allow enough time for EISSC to develop position papers, SES/Policy members to clear calendars)
- Subsequent meetings, TBD [monthly conference call or as need determined by EISSC??]

#### Range of Issues:

- Technical study limitations (e.g., missing pieces, fix flaws now/late, \$\$\$, etc.)
- Significance of technical study findings (indicators v. "bright lines," etc.)
- Appropriate alternative framework (contrast, what's baseline, Haden ruling, etc.)
- Adequacy of study findings to support alternatives
- Actions in dispute (cumulative terrestrial, PMLU, AML funding, fill v waste, etc.)
- Use of DEIS for NEPA compliance for agency actions (OSM rules, NWP21, WQ standards, etc.)
- Preferred alternative (consensus, agency choice, etc.)
- EISSC ground rules for operation (leadership, facilitation, membership, voting, FOIA release coordination, etc.)
- EIS Schedule

Next steps—wait for Principals

Adjourn

DRAFT - This document is a pre-decisional draft document that has been prepared merely for discussions among the agencies preparing the MTM/VF EIS. This document should not be released under the FOIA in that it will (1) confuse the public and (2) stymie open dialogue between government staff who are jointly preparing the MTM/VF EIS. Page 6

## II. Why are we doing this EIS in light of recent events?

The December 23, 1998, settlement agreement voluntarily entered into by the U.S. Army Corps of Engineers (COE), West Virginia Department of Environmental Resources (WVDEP), and the plaintiffs in the lawsuit captioned *Bragg et al. v. Robertson et al.*, Civ. No. 2:98-0636 (*Bragg*, S.D.W.Va.) settled all claims brought against the Federal defendant (i.e. the COE) for their alleged failure to carry out their statutory duties under the Clean Water Act (CWA) and the National Environmental Policy Act ("NEPA"). Even though, a similar lawsuit (*Kentuckians for the Commonwealth, Inc. v. Rivenburgh* Civ. No. 01-0770 (*KFTC*, S.D. W.Va.)) was filed against the COE by a new set of plaintiffs and a summary judgement for the plaintiffs was granted by the court, there is no breach of the December 23, 1998, settlement agreement and the parties continue to be obligated by the terms of the agreement.

Paragraph 7 of the December 23, 1998, *Bragg* settlement agreement established long-term relief by committing the U.S. Environmental Protection Agency (EPA), the COE, the Office of Surface Mining (OSM), the U.S. Fish and Wildlife Service (FWS) and WVDEP to prepare an Environmental Impact Statement (EIS) on a proposal to "consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize, to the maximum extent practicable, the adverse environmental effects to water of the United States and fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills." On February 9, 1999, the agencies announced their intention to do an EIS in accord with the stated purpose of the December 23, 1998, agreement.

Overall, the recent events (i.e. the court's decision in *KFTC*; publication of the "fill" rule by the COE and EPA; and the reauthorization of Nationwide Permit 21) have not changed the purpose of the EIS as described in the December 23, 1998, settlement agreement and February 9, 1999, *Federal Register* notice. However, the EIS Steering Committee acknowledge that the alternative framework as depicted by the January 2001 version of the internal draft EIS document should be revised to move away from categorizing alternatives primarily based on fill restrictions and moving towards a more flexible framework to address a host of issues uncovered by the EIS studies and to fulfill needs of each of the agencies involved as part of the EIS.

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## III. Issues with Existing Alternative Framework

The following is an overview description of the current problematic alternative framework from the June 2002 internal working copy of the DEIS.

Table IV.1. Mountaintop Mining / Valley Fills Alternative Summary	
Alternative A	No changes to the SMCRA and CWA programs in effect in 1998
Alternative B	Depending on the outcome of a detailed, permit-by-permit baseline data collection; thorough, site-specific, significant adverse impact analyses; and, consideration of alternatives for avoidance and minimization, valley fills could be allowed in ephemeral, intermittent, and perennial stream segments. Mitigation of unavoidable impacts would require in-kind replacement of aquatic functions and values within the watershed.
Alternative C	Valley fills could be located in ephemeral and intermittent streams. Permit-by-permit baseline data collection and site-specific alternatives analyses would be required (although not necessarily as rigorous as in Alternative B) to demonstrate that avoidance and minimization were considered. Mitigation options for unavoidable impacts would be somewhat more varied and thus more flexible than under Alternative B.
Alternative D	Valley fills could be located only in the ephemeral portion of streams. Permit-by-permit baseline data collection would be more limited than under Alternative B, and alternative analyses would demonstrate that minimization of downstream or indirect impacts were considered. Mitigation could include compensation in lieu of in-kind replacement of lost aquatic function and value.

Consensus does not exist among the agencies on this framework. Some agencies believe that the technical studies do not provide adequate data and analyses to support selecting an alternative based on watershed size restrictions. Several key technical studies needed to support the existing alternative framework are flawed and can only serve as indicators for environmental and economic consequences. Much additional time and money would be required to correct these deficiencies. Some agencies question the scope of analysis of the DEIS, suggesting that the purpose of the EIS is to evaluate not just fills, but the impacts of MTM as well. Others have been concerned about the lack of analysis on mining through streams, coal waste and other MTM impacts on WOUS. Several agencies feel that the focus of the current alternatives is weighted too heavily toward aquatic impacts and too light on terrestrial impacts. Finally, the recent Haden II decision in *KFTC* undermines the basic assumptions of the alternative framework by bringing into question the applicability of CWA 404 regulatory program for all but certain types of valley

fills.

#### IV. Agency Expectations for EIS Accomplishments

The following statements were provided by each co-lead agency as a brief summary of what the respective agency believes is important in considering any new direction for this EIS or its alternative framework.

##### *Fish & Wildlife Service*

"FWS fully supports the stated purpose of the MTM/VF EIS; namely, 'to consider developing agency policies, guidance, and coordinated agency decision making processes to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and fish and wildlife resources affected by mountaintop mining operations....'. The EIS should evaluate and inform agency decision makers and the public on the effects of mountaintop mining practices. This EIS should also serve as the starting point for regulatory agency actions that will result in the full utilization of their authorities to improve decision making and minimize the adverse environmental effects of these practices."

##### *Environmental Protection Agency*

"EPA continues to support the original purpose for the EIS as stated in the Federal Register Notice of Intent. Our expectation is for the EIS to evaluate the environmental effects of mountaintop mining/valley fill activities, and to develop specific programmatic responses designed minimize or avoid the impacts that have been identified."

Disputed actions which EPA believes should be addressed by the EIS:

"Cumulative terrestrial impacts from MTM/VF activities are considered to be significant, and have a high level of public interest. Incentives to promote reforestation have been developed and must be included as commitments within the EIS. Post Mining Land Use (PMLU) studies suggest that, in general, post-mining development has not occurred as envisioned when variances are requested from the requirements to return the land to a condition capable of supporting its prior use. Actions to ensure that PMLU development occurs as envisioned have been developed, and must be included as commitments within the EIS. These incentives are especially important if the ruling in the recent KY lawsuit is upheld."

EPA believes that the EIS should result in clear Nationwide Permit thresholds:

"We believe NWP 21 minimal impact thresholds to delineate surface coal mining excess spoil discharges in waters of the U.S. (individually and cumulatively) are required."

##### *West Virginia Department of Environmental Protection*

"Filling regulatory gaps to accomplish coordinated, consistent, efficient decision making in the regulation of mining operations to effectively protect the environment. Specific items of concern are:

- 1) interpretation/application of buffer zone rule
- 2) fill material definition
- 3) using ESA to prevent duplication of efforts
- 4) coordinated decision making, and
- 5) timely process to resolve differences between agencies"

##### *Army Corps of Engineers*

The COB believes the following issues should be addressed by the EIS:

"1. GIS-based Environmental/Economic Impact Model - interagency working group determined that it is flawed because it over estimates the economic impacts of regulation, and under estimates impacts to aquatic resources [not ready to support decision making; credibility issue also]

2. Stream Impact Analyses - macrobenthic and fisheries studies inconclusive; chemistry study identified potential issues associated with selenium but more study is needed to consider distance, time, amounts; limited data/sampling sets thus far; not ripe for impact assessment or decision making)

3. Scope of Analysis [critical issue for the Corps]

- Corps scope of analysis is limited to the aquatic environment - we do not regulate mining per say, and it is inappropriate to try to flex the Corps jurisdiction up-slope (OSM needs to change their regulations to better address terrestrial and social impacts)
- DEIS currently only evaluates alternatives focused on the aquatic environment - this is only half the answer - alternatives need to be formulated that address terrestrial and social impacts that are not the Corps responsibility; right now there is redundancy in "waters" and a void up-slope (OSM needs to change their regulations to better address terrestrial and social impacts)
- OSM staff reported at a May 15, 2002, meeting at CEQ that alternatives were developed in consideration of the authorities, funding, and existing programs of the agencies. Army pointed out and EPA and CEQ seemed to agree that the NEPA documents should identify broad ranges of alternatives, including alternatives that recommend new or modified authorities, funding increases, or program changes.

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4. Need to Complete the DEIS - The use of this document to Army and the Corps, if it does not include evaluations of all of the environmental impacts of Mountaintop Mining/Valley Fills, is minimal. We are proceeding with developing consistency within our agency on 1) waters of the U.S. jurisdictional extent, 2) a stream assessment protocol, 3) mitigation requirements and 4) minimal and cumulative impacts thresholds. Unless this document can serve as an umbrella document that can be tiered off of under NEPA, it does not serve a function for our agency. The Corps will not agree to a set size restrictions on the use of NWP 21, but is working diligently on consistency for its use.

5. Preferred Alternative - The draft letter from Mr. Griles (DOI) to the Principals of the Steering Committee focuses on the issue of whether or not the DEIS should identify a preferred alternative, and recommends that "at a minimum, this requires identification of a preferred alternative". Based on issues 1-4 summarized above, it is premature to make this very important decision.

BOTTOM LINE: DEIS is not acceptable to Army in its current state. The GIS-based model should be redone, additional analysis on selenium impacts should be accomplished, and terrestrial alternatives need to be identified and evaluated in accordance with NEPA. Army recommends delaying release of the DEIS until these actions are completed (8-12 months?)."

#### Office of Surface Mining

- "Provide a defined, efficient, and stable regulatory framework to assure compliance with the Clean Water, Surface Mining Control and Reclamation, and Endangered Species Acts. Finalize the MTM/VF EIS so that the Bragg settlement agreement is satisfied/and closed out and that necessary programmatic changes can actually be implemented by the agencies to realize on the ground improvements and eliminate the current atmosphere of regulatory uncertainty.
  - Avoids, minimizes and mitigate impacts to aquatic and other environmental resources, to the extent allowed by federal law, while still providing for the nation's considerable energy needs.
  - Clarifies CWA statutory and regulatory concepts such as impact thresholds, how to value streams, and acceptable mitigation practices that will offset unavoidable impacts
  - Provide, where possible within SMCRA authority, OSM regulatory requirements consistent with the CWA
  - Coordinates implementation of agency permitting and oversight programs so as to eliminate redundant reviews of proposals by different agencies where statutory or regulatory requirements overlap.
  - Assures best science is utilized to document the significance of impacts objectively for agency decision making"

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#### V. Proposed EIS Alternative Framework

The EIS Steering Committee has tentatively agreed to an alternative framework, consisting of three alternatives:

**No Action Alternative (A)**- Administering the respective programs in accord with the programs' controls and interagency decision making processes in place prior to December 23, 1999. (This baseline may be open for discussion because of some agencies' implementation of regulatory changes since 1998 to address MTM/VF issues).

**Alternative B - (Most Environmentally-Protective Alternative)** From the 60+ actions that have been identified so far to reduce impacts identified by the technical studies conducted for the EIS, this alternative would represent the suite of actions that would result in the most environmentally-protective alternative (i.e., restricting fills to the ephemeral zone, development of PMLU criteria and bonding requirements to assure planned development occurs, development of improved reforestation techniques where reforestation is the approved PMLU, improved permit review and coordination procedures, etc. (See footnote 1). Note that the most environmentally-protective alternative excludes economics and administrative difficulty from consideration.

**Alternative C (Agencies' Preferred Alternative)** - From the 60+ actions that have been identified so far to reduce impacts, the suite of actions that have been determined to be most efficient and effective ways of improving the regulatory programs to address scoping concerns. This suite of actions takes economic and administrative considerations into account. The technical studies will provide indicators in support of analysis of the relative environmental and economic effects of Alternative B actions and justification for selection of preferred actions for Alternative C. Action agency(ies) may be afforded deference on whether or if a particular method of action implementation is listed under this Alternative C.

**Subordinate Issue** - The question was raised whether all 60 possible actions should be listed in Alternative B or whether the agency with ultimate responsibility of implementing an action should have the right to reject an action outright?

Of the 60 possible actions currently being considered, some may be more viable than others in addressing EIS scoping issues. Some agencies on the EIS Steering Committee may even view a small minority of actions as counterproductive. I.e., an action may make a problem worse instead of improving the regulatory program; or, there may be fundamental Constitutional legal issues, such as takings implications, which make an action inadvisable. NEPA does not support presenting unreasonable alternatives.



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The EIS Steering Committee recommends that the preferred Alternative C (suite of preferred actions) be identified in the draft EIS, which will be released to the public. Based on public comments, the suite of preferred actions may change:

- actions identified but not selected in Alternative B may be added to the suite of recommended actions;
- some actions may be deleted from the preferred suite; and
- other actions may be modified

The timing and means of implementation of the individual action recommendations will be the responsibility of the action agency(ies). Agency implementation of actions may require additional information (study and/or analysis) and NEPA compliance to supplement the information in the MTM/VF EIS.

What are the advantages of the proposed EIS alternative framework?

- ☐ Individual actions will be selected on their merit; opposed to attempting "lump" many unrelated actions under a single alternative.
- ☐ The importance of any one EIS study become less important than the overall indications presented by all studies. No additional studies or supplement of additional studies will be needed.
- ☐ Minimal delays in moving forward with draft EIS.
- ☐ Maintains current list of actions in a "repackaged" framework, which will mute somewhat public perception that the DEIS has been radically altered from draft versions released and widely circulated
- ☐ General agreement among the EIS agency representatives on the revised framework.
- ☐ Deference to the action agency, if decided, limits Steering Committee disagreement.

What are the disadvantages of the proposed framework?

- ☐ A minority of members feel that the new framework does not meet the NEPA requirements by providing a contrasting choices among several clear and distinct viable alternatives

On the other hand, other agencies on the EIS Steering Committee feel that all 60 possible actions have some potential merit and full disclosure will show that a wide range of solutions were considered as potential government actions in the EIS. The Alternative B analysis will show why a particular action is not listed in the preferred suite of Alternative C.

John Goodin  
06/20/2002 08:44 AM  
To: Clay Miller/DC/USEPA/US  
cc: Brenda Malory/DC/USEPA/US@EPA, John  
Lishman/DC/USEPA/US@EPA  
Subject: EIS

Kathy Hodgkiss (R3 WDD) has committed to weekly phone calls at 8:00am on Thursdays with the WD to keep coordination tight

We've moved! Please note that all my contact information except my e-mail address has changed. Effective March 11, 2002, I can be reached at:

phone: 202-566-1373  
fax: 202-566-1375

mailing address:  
Wetlands Division (4502T)  
US Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

street address:  
EPA West - Room 6106R  
1301 Constitution Avenue, N.W.  
Washington, D.C. 20004

--- Forwarded by John Goodin/DC/USEPA/US on 06/20/02 08:43 AM ---

Gregory Peck  
06/20/02 08:28 AM  
To: John Goodin/DC/USEPA/US@EPA, Clay Miller/DC/USEPA/US@EPA  
cc:  
Subject: EIS

This train is leaving the station so if we have any issues we better get them raised very soon. Can we talk about this today or tomorrow?

Thanks  
--- Forwarded by Gregory Peck/DC/USEPA/US on 06/20/02 08:24 AM ---

William Hoffman  
06/19/02 04:16 PM

To: "Stump, Jennifer M." <jstump@GFNET.com>, Andy  
Mozynski/DC/USEPA/US@EPA  
cc: Elaine Suriano/DC/USEPA/US@EPA, David  
Rider/R3/USEPA/US@EPA, Kathy Hodgkiss/R3/USEPA/US@EPA,  
mrobiasc@esonne.gov, Charles K. Stark/hq02.usaca.army.mil,  
Dave\_Denismore@hvs.gov, dvanclinda@mail.dep.state.wv.us,  
Michael Costello/R3/USEPA/US@EPA, Gregory  
Peck/DC/USEPA/US@EPA  
Subject: Re: out of office

Jennifer/Andy:

At our meeting on Tuesday, we agreed on the attached revised framework for the EIS, and the Steering Committee will be meeting in Pittsburgh July 1-3 to refine. Alternative A continues to be the baseline or no-action alternative, B is the most environmentally protective alternative suite of actions (discounting administrative ease and/or economic considerations), and C would be the agencies preferred alternative suite of action items. The action items would be listed by environmental issue area much as we did for the current emergency. I presume Alternative C will be very similar to the current B; and that B will be a collection of actions that the agencies agree are the most restrictive/protective measures (restricting to the ephemeral zone, enhanced monitoring, in-basin/in-kind mitigation, etc etc). All sixty possible actions would be described as potential actions in the body of the alternatives analysis, would be analyzed

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separately in the EIS, and would end up in either Alt B or C, or would be dismissed by the agencies.

For planning purposes, DO 4002's new Task 3 will probably direct GF to: a) Attend a meeting (or call) with the Steering Committee during the week of July 8th so the new alternative structure can be laid out more formally; b) Reorganize the EIS using the new alternative construct provided by the Agencies during the July meeting; c) Submit a revised working draft during the week of August 12th; d) Receive comments and/or meet with the Agencies during the week of August 18th to revise the document; and, e) submit a concurrence copy by August 27th.

It is my understanding that if the contractor can't meet the dates due to circumstances beyond its control (the agencies don't get the alternative structure or their comments to the contractor in a timely manner), the period of performance can be extended past August 27th.

Andy- is this enough for you to get the new Task going contractually? I am out until Monday. Elaine can probably help clarify this if you can't reach me. Stay tuned everyone!

Bill



Revised Alternatives Structure.w

William J. Hoffman (SES30)  
Acting Director, Office of Environmental Programs  
Environmental Services Division  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-2955  
"Stump, Jennifer M." <jstump@GFNET.com>



"Stump, Jennifer M."  
<jstump@GFNET.com>  
>  
06/19/02 10:05 AM

To: William Hoffman/R3/USEPA/US/EPA  
cc:  
Subject: out of office

Hi, want to give you a heads up. If you need anything from me before July 1, please get in touch with me today or early tomorrow. I will be out of the office for a project in Alaska starting Friday June 21. I will be in the field without my laptop. I will not be checking e-mail until July 2. I will try periodically to check my voice mail messages but this will be sporadic.

Jennifer Stump  
GANNETT FLEMING, INC.  
207 Senate Ave., Camp Hill, PA 17011  
Phone: (717) 763-7212, ext. 2885  
Fax: (717) 763-7323

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#### Proposed EIS Alternative Framework

**No Action Alternative** - Administering the respective programs in accord with the program controls and interagency decision making processes in place prior to December 23, 1999. (This baseline may be open for discussion because of some agencies' implementation of regulatory changes since 1999 to address MTM/VF issues). Under this alternative, the impacts of mountaintop mining/valley fill operations would be described based upon the technical studies conducted to date by the agencies.

**Alternative B - (Environmentally Preferable Alternative)** From the 60+ actions that have been identified so far to reduce impacts identified by the technical studies conducted for the EIS, this alternative would represent the suite of actions that would result in the least environmental impact (i.e. restricting fills to the ephemeral zone, development of PMLU criteria and bonding requirements to assure planned development occurs, development of improved reforestation techniques where reforestation is the approved PMLU, improved permit review and coordination procedures, etc). Note that the environmentally preferable alternative excludes economics and administrative difficulty from consideration. It is simply the environmentally preferable alternative.

**Alternative C (Agencies' Preferred Alternative)** - From the 60+ actions that have been identified so far to reduce impacts, the suite of actions that have been determined to be most efficient and effective ways of improving the regulatory programs to address scoping concerns. This suite of actions takes economic and administrative considerations into account. The technical studies will provide indicators in support of analysis of the relative environmental and economic effects of Alternative B actions and justification for selection of preferred actions for Alternative C.

The EIS Steering Committee recommends that the preferred Alternative C (suite of preferred actions) be identified in the draft EIS, which will be released to the public. Based on public comments, the suite of preferred actions may change:

- actions identified but not selected in Alternative B may be added to the suite of recommended actions;
- some actions may be deleted from the preferred suite; and
- other actions may be modified

The timing and means of implementation of the individual action recommendations will be the responsibility of the action agency(ies). Agency implementation of actions may require additional information (study and/or analysis) and NEPA compliance to supplement the information in the MTM/VF EIS.



Kathy Hodgkiss  
06/27/2002 06:39 AM

To: Elaine Surlano/DC/USEPA/US@EPA, Gregory  
Peck/DC/USEPA/US@EPA, John Goodin/DC/USEPA/US@EPA  
cc:  
Subject: Mock-up of Proposed new Alternative Framework

Kathy Hodgkiss, Acting Director  
Environmental Services Division  
U.S. EPA Region 3  
215/814-3151

--- Forwarded by Kathy Hodgkiss/R3/USEPA/US on 06/27/02 08:36 AM ---



William Hoffman  
06/27/02 06:23 AM

To: Kathy Hodgkiss/R3/USEPA/US@EPA, Rider.David@EPA.GOV@EPA,  
Somerville.Eric@EPA.GOV@EPA  
cc: Donald Welsh/R3/USEPA/US@EPA,  
Votaggio.Tom@EPA.GOV@EPA, Kampf.Rich@EPA.GOV@EPA  
Subject: Mock-up of Proposed new Alternative Framework

For the call this morning, this matrix is pretty close to representing how the actions would look under the new framework. Some of the actions from B may still need to get put into C (and it appears that OSM still has a problem with including some of them into B). This will be flushed out next week in Pittsburgh.

Dave Rider said he saw a presentation yesterday on the KY stream assessment protocol that the COE is floating as the tool for determining if NWP21 applies and said it looked pretty good. This makes me more comfortable with the wording of those related actions in the matrix.

Have fun on the call today. I will be on a treadmill getting injected with isotopes. Sound like more fun than you'll be having on the call!

William J. Hoffman (3ES30)  
Acting Director, Office of Environmental Programs  
Environmental Services Division  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-2886

--- Forwarded by William Hoffman/R3/USEPA/US on 06/27/02 08:13 AM ---



Mike Robinson  
<MROBINSO@OSMRE.GOV>  
06/26/02 02:46 PM

To: Michael Castle/R3/USEPA/US@EPA, David  
Rider/R3/USEPA/US@EPA, Elaine Surlano/DC/USEPA/US@EPA,  
William Hoffman/R3/USEPA/US@EPA, Gregory  
Peck/DC/USEPA/US@EPA, Cindy Tibbott@wa.gov,  
dave\_densmore@fws.gov, jstump@fnet.com,  
Charles.K.Stark@hq02.usace.army.mil,  
Katherine.L.Trotter@HQ02.USACE.ARMY.MIL, gconnad@lmcc.los.us,  
James.M.Townsend@hq02.usace.army.mil,  
dvandell@dep.state.wv.us, rhunter@mail.dep.state.wv.us,  
Paul.Rothman@mail.state.ky.us, bcl@mme.state.va.us,  
lsv@mme.state.va.us  
cc: Al Klein <AKLEIN@OSMRE.GOV>, Dave Hertis  
<DHARTIS@OSMRE.GOV>, Jeff Coker <JCOKER@OSMRE.GOV>,  
John Crayton <JCRAYTON@OSMRE.GOV>, Jeffrey Jarrett  
<JJARRETT@OSMRE.GOV>, Mary Josie Blanchard  
<MBLANCHA@OSMRE.GOV>, Stephen Sheffield  
<SSHEFFIE@OSMRE.GOV>  
Subject: Mock-up of Proposed new Alternative Framework

Attached is our promised preliminary attempt to take a reasonable facsimile of

EXHIBIT 35

existing actions from the June 2002 Alternative (Chapter IV) from the G-F CD of the DEIS and "repackage" them in the recently-proposed framework sanctioned for trial by the SRS Issue Resolution Group. Please review the approach and be prepared to discuss the document or other options at our meeting next Monday here in Pittsburgh.

Also consider when you think about this document that there are (at least) a couple or three other ways to present the Alternatives framework. As discussed with CEQ on Monday, the Baseline (pre-1998) presented in the attached document could be merged as part of Alternative A, representing "where we've been" and "where we are now;" or, the example No Action Alternative A could be merged with Alternative C to represent "where we are now" and "where we are going." The other approach was as described by Dinah Bear in the Spotted Owl case--a two-step approach: the baseline becomes an alternative (although generally infeasible) upon which to compare the no action (Alt A), and Alt's B and C are compared to A. If you followed that explanation, congratulations! If not, we'll sort it out next week.

Please note that the former "Tier III" actions are italicized and the "disputed actions" are in bold.

Revised/Attached Matrix All.htm

[illegible]

Mountaintop Mining Valley Mills Alternative Framework  
(June 26, 2002 v.)

[illegible]

Issue	Baseline (1998)	Alternative A (No Action Alternative (2002))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
<b>Stream Impairment (cont'd.)</b>				
	SMCRA agencies require coal companies to submit pre-permit baseline data to document, under seasonal conditions, the pre-mining conditions of streams and water bodies that could be affected by mining. Monitoring of streams and point source discharges continues after the SMCRA permit is issued. Baseline and post-permit approval information contains, at a minimum, data on total suspended solids (TSS), total dissolved solids or specific conductance, pH, total iron (Fe), and total manganese (Mn). Acidity and alkalinity data is provided if there is a potential for acid mine drainage. Point sources are monitored in accordance with NPDES parameters.	While no modification of OSM baseline water quality/quantity requirements have occurred, companies seeking CWA 404 approval are collecting and submitting the EPA protocol information as part of the SMCRA permitting process to WV.	OSM will change pre-application, during-mining, and post-mining monitoring requirements to consistently reflect any changes in CWA rules, policies, or guidelines.	OSM will change pre-application, during-mining, and post-mining monitoring requirements to consistently reflect any changes in CWA rules, policies, or guidelines.
<b>Fill Minimization</b>				

Issue	Baseline (1998)	Alternative A (No Action Alternative (2002))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
The quantity of spoil that is necessary exists is not affirmatively demonstrated as part of fill minimization, nor has the ability of valley fills been based on the most environmentally protective practicable alternative.	CWA Section 404 program requires that the applicant demonstrate that placement of fill into "water of the United States" is necessary after avoiding, minimizing, and mitigating unavoidable impacts. Applications must include an analysis of "upland" alternatives out of streams. However, COE deferred judgement, assuming SMCRA permit considered fill necessity and minimization criteria.  SMCRA requires that all mine spoil necessary to achieve backfill the mined area to approximate original contour (AOC) or variations to AOC to support the right mining land use be returned to the mined area. OSM defers final judgement to the appropriate SMCRA authority as to whether these requirements have been achieved. State SMCRA agencies do not require a demonstration that excess spoil has been avoided or minimized.	COE independently reviews information contained in SMCRA permit application to determine whether the CWA Section 404 requirements for necessity and minimization have been satisfied.  OSM encouraged states to develop protocols for fill minimization. WVDEP implements AOC. Tennessee develops fill minimization policy. OSM assists Virginia and Kentucky develop a fill minimization process.	No fill minimization necessary, because no fills prohibited in WOU.	COE will establish policy or guidelines on what analyses are sufficient to demonstrate avoidance and minimization of fill placement in WOU.  OSM will develop guidance, policy, or initiate rule making, consistent with CWA requirements, to account for excess spoil and backfill volume material balance. Program changes will require that the SMCRA permit application include an alternative analysis of all potential locations for excess spoil fills in the permit and adjacent areas to ensure excess spoil placement in WOU has been minimized to the maximum extent practicable.

Issue:	Baseline (1998)	Alternative A (No Action)	Alternative B (Partial Implementation)	Alternative C (Full Implementation)
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[illegible]

Issue	Baseline (1998)	Alternative A (No Action Alternative (2002))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
<i>Offset Unavoidable Impacts</i>				
<b>Effectiveness of Mitigation</b>				
Effectiveness of compensatory mitigation projects to make up for loss of stream habitat and aquatic functions is unknown. Mitigation determinations are inconsistent from state to state. No rat values have been established to compensate for aquatic functions impacted and no yardstick for mitigation ratios exist.	COE defers compensatory mitigation for coal mining activities to state water quality authorities. Mitigation is associated with state water quality certification (CWA 401) of proposed CWA 404 permit. Thresholds and mitigation requirements vary from state to state but usually involvement to payment for loss of stream as opposed to restoration of stream habitat and aquatic functions. No CWA performance bond required.  SMCRA requires on-site mitigation and performance bonds are posted to assure reclamation is accomplished.	COE releases NWP 21 requiring District Engineer to consider mitigation (restoration of aquatic function and values on- or off-site) to offset all cases of unavoidable impacts. RPT used to determine adequate mitigation ratios and types. No mitigation scales or values established. No CWA performance bond required.  SMCRA bonds cover on-site mitigation only.	CWA mitigation not required, as no fills permitted in WOUS. CWA bonding for mitigation not required, as no fills permitted in WOUS.  <i>Note: This Tier III action would not be required if NHPs are established in WOUS because it would be a desired action by COE in A.R.G.I. CWA regulatory authorities will assess aquatic ecosystem restoration methods for select lands and promote demonstration sites. COE will also work with academia and industry to develop a "best management practices or BMPs" manual for restoration or replacement of aquatic resources— including detailed information on the delineation, protection, mitigation, restoration and replacement of stream, riparian zones, and related ecological resources.</i>	COE will require mitigation/compensation ranging from in-backs and in-kind to replace impacted aquatic habitat values in potential streams to compensatory mitigation possible as impacts affect only ephemeral streams. COE will establish permit inspection schedules and establish financial liability (e.g., bonding and/or insurance) to assure reclamation and mitigation/compensation projects are completed successfully.  Once mitigation requirements are established, OSM and the COE could work to coordinate SMCRA and CWA requirements to establish financial liability (e.g., bonding and/or insurance) to assure reclamation and mitigation/compensation projects are completed successfully.
<i>Minimizing Environmental Effects of Multiple Surface Coal Mining Permits within a Cumulative Impact Area</i>				
<b>Cumulative Impacts</b>				

Issue	Baseline (1998)	Alternative A (No Action Alternative (2002))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
Cumulative Impacts: Over 7% of steep slope Appalachian watershed headwater streams have been eliminated by valley filling. A reduction of interior forest lands would jeopardize T&E songbirds and other mammal and herpetofaunal species. Past mining changed forested vegetation to nonforested habitat, which could take hundreds of years to return to forested and native species habitat.	The COE is required by NEPA to consider the cumulative effects on the human environment prior to granting CWA 404 PAs.  TMDLs guide NPDES for impaired streams on CWA 303(d) list.  SMCRA regulatory agencies consider the cumulative hydrologic effects (quantity and quality) of the proposed mining operations, past mining operations, and all anticipated operations in the decision whether to issue a SMCRA permit.	The COE is required by NEPA to consider the cumulative effects on the human environment prior to granting CWA 404 PAs.  TMDLs guide NPDES for impaired streams on CWA 303(d) list.  SMCRA regulatory agencies consider the cumulative hydrologic effects (quantity and quality) of the proposed mining operations, past mining operations, and all anticipated operations in the decision whether to issue a SMCRA permit.	CWA regulatory authorities will establish a rebuttable presumption that at least one headwater stream per tributary system must be preserved or reconnected in a natural condition in order to maintain a contribution to downstream aquatic energy needs.  TMDLs guide NPDES for impaired streams on CWA 303(d) list.  SMCRA regulatory agencies consider the cumulative hydrologic effects (quantity and quality) of the proposed mining operations, past mining operations, and all anticipated operations in the decision whether to issue a SMCRA permit.  If Congressional authority established, cumulative terrestrial impacts will be considered in permit decisions.	CWA regulatory authorities will establish a rebuttable presumption that at least one headwater stream per tributary system must be preserved or reconnected in a natural condition in order to maintain a contribution to downstream aquatic energy needs.  TMDLs guide NPDES for impaired streams on CWA 303(d) list.  SMCRA regulatory agencies consider the cumulative hydrologic effects (quantity and quality) of the proposed mining operations, past mining operations, and all anticipated operations in the decision whether to issue a SMCRA permit.

Issue	Baseline (1990)	Alternative A (No Action Alternative (2002))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
<i>Minimizing Environmental Effects of Multiple Surface Coal Mining Permits within a Cumulative Impact Area (cont'd)</i>				
Cumulative Impacts (cont'd)				

Issue	Baseline (1990)	Alternative A (No Action Alternative (2002))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
<p>If increases in reclamation and revegetation requirements do not occur, future mining may affect as much as 10% (200,000 acres) of the degraded WV ecosystem (3,000,000 acres, or 88% of the current land use) in WV. Past mining affected more than 200,000 acres and current mining affects around 245,000 acres in WV (part of the 12% non-forested land use).</p>			<p>DOE and EPA will prepare a guidance document to assure that applicants provide adequate information for use in NEPA compliance with respect to the required cumulative impact assessments of mining and other non-mining uses of watershed disturbances.</p> <p>State and Federal regulatory authorities could require development of an electronic permit application system, building a national digital data system to support the permit application process—consolidating all state and federal baseline data/analysis requirements.</p> <p>Watershed planning groups could be promoted, including all stakeholders, to advise agencies on abandoned mine-land reclamation, mining concerns, land use opportunities, etc. Mining companies could be encouraged to establish more consistent and effective outreach with citizens and local communities in watersheds affected by their operations.</p> <p>EPA and the states could sponsor research to evaluate sediment discharges from timber harvesting and road building/repair as they combine or compare with mining.</p> <p>CWA authorities will establish "total maximum daily loads" (TMDLs) under the Clean Water Act for pollutants affecting watersheds in nonmining areas. In addition to mining, both point and non-point source pollutant discharges from shelter industrial and agricultural activities such as feedlotting, road building and other construction that contribute shelter pollutants in a watershed would be regulated.</p> <p>DOE could consider releasing an consequences reclamation provisions to assure that these provisions are adequate to sustain both the assets of disturbance of any one area and the time period for which a</p>	

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Issue	Baseline (1998)	Alternative A (No Action Alternative (2002))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
<i>Minimizing Environmental Effects of Multiple Surface Coal Mining Permits within a Cumulative Impact Area (cont'd)</i>				
Cumulative Impacts (cont'd)			<p>SMCA and CHA regulatory authorities could encourage reclamation of previously mined areas as a possible offset to civil penalties.</p> <p>Create "land trusts," utilizing "banking" of riparian areas, or other creative mitigation techniques (such as CHA reforestation, carbon sequestration credits, etc.) to offset mining impacts.</p>	
<i>Best Management Practices</i>				
Deforestation				

Issue	Baseline (1998)	Alternative A (No Action Alternative (2002))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
<p>Effects of MTM/F and resulting deforestation/forest fragmentation on plants and wildlife.</p> <p>Large mountaintop mining operations typically utilize grass species for quick erosion control. This type of vegetation, combined with compaction, inhibits the growth of trees—either where forestry is the planned PMLU or where natural succession is expected to occur.</p> <p>Natural succession is further impeded because there are large expanses of grassland species between forest edges, for which invasion of native seed sources cannot eclipse but over many hundreds of years. Topsoil substitution does not result in salvaging organics from native species, which further retards replacement of native seed sources.</p>	<p>Non-harvested forest material is burned or baled.</p> <p>Topsoil substitution will preclude MTM/F operations.</p> <p>OSM and State regulatory authorities work with academia, industry and others to promote the benefits and the best technology for growing trees on reclaimed mine sites. Best management practices are incorporated into technical guidance distributed to the coal industry to encourage proper soil handling techniques to avoid over compaction, to identify the best growth medium for growing trees, and optimal revegetation techniques to avoid competition by seedling appropriate herbaceous cover and to promote the growth of commercially viable trees and native hardwoods.</p>	<p>WV, KY, and VA have successful reforestation guidelines. OSM's reforestation initiative is seeking incentives for and identifying impediments to reclamation with trees.</p> <p>OSM and State regulatory authorities work with academia, industry and others to promote the benefits and the best technology for growing trees on reclaimed mine sites. Best management practices are incorporated into technical guidance distributed to the coal industry to encourage proper soil handling techniques to avoid over compaction, to identify the best growth medium for growing trees, and optimal revegetation techniques to avoid competition by seedling appropriate herbaceous cover and to promote the growth of commercially viable trees and native hardwoods.</p>	<p>If Congressional authority established, reforestation with trees would be deemed the preferable land use where forestry was the pre-mining condition unless documentation provided to demonstrate otherwise uses created improved economic or environmental benefit.</p> <p>OSM will develop BMD manuals on growth medium preparation, forestry maintenance, and other terrestrial habitat improvements. OSM will also continue the reforestation initiative with education, training, technology transfer, and cooperation between OSM, states, industry, researchers, and landowners on the benefits and methods to effectively and economically reclaim to trees.</p> <p>State fish and wildlife agencies, in cooperation with FWS, could revise stream fish and wildlife plans. (If necessary, and develop guidance and training to promote biological sustainability and re-introduction of native plants (including hardwoods and fruit trees).</p>	<p>OSM, in cooperation with the states and research community, will develop guidelines identifying state-of-the-science, best management practices (BMPs) for: 1) selecting appropriate growth medium from available species, weathered subsoil and underlying rock/soil, or topsoil substitutes and development of the best reclamation plan to best support the intended post-mining land use (PMLU); 2) further enhance natural succession or re-establishment of native riparian or wildlife habitat; 3) reducing soil compaction of the growth medium—particularly where trees are intended; 4) using less competitive herbaceous ground cover to encourage tree growth and control erosion; 5) selecting tree and shrub species suitable for the best-guided soil and the approved PMLU; 6) creating permit-specific or programmatic standards for measuring the success for tree, shrub stocking, and ground cover; 7) utilization of slash and non-harvested forested materials; and 7) maximizing to the extent economically practicable, the commercial recovery of forest products prior to initiating mining activities. OSM will evaluate the reforestation initiatives through education, training, technology transfer, and cooperation between OSM, states, industry, researchers, and landowners on the benefits and methods to effectively and economically reclaim to trees.</p>

Issue	Baseline (1998)	Alternative A (No Action Alternative (2001))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
<b>Best Management Practices (cont'd.)</b>				
<b>Blasting</b>				
Effects of MTM on communities, homes, water wells, and quality of life.	OSM and the state implement mobile health and safety requirements of the SMCRA program on blasting and fugitive dust.	OSM conducts routine oversight and research on blasting forces that may identify regulatory improvements.	OSM could provide updated guidance materials, analytical tools, and training for state regulatory program staff and certified blasters to heighten the understanding and evaluation of seismic and air blast contributions to protecting nearby structures and minimizing nuisance or annoyance.  State regulatory authorities could consider expanded blaster certification and training programs and dedicating blasting specialists if complaint levels warrant.	OSM implements any regulatory program improvements identified by oversight or research findings.
Potential health risks of airborne dust and fumes from blasting	EPA is responsible for Clean Air Act implementation regarding air quality.	EPA is responsible for Clean Air Act implementation regarding air quality.	EPA and the state air quality authorities will evaluate current regulatory programs for controlling dust and blasting fumes and develop Best Management Practices (BMP) as a means of effectively controlling these emissions outside of the permit area under specified physical/metereological conditions.	EPA and the state air quality authorities will evaluate current regulatory programs for controlling dust and blasting fumes and develop Best Management Practices (BMP) as a means of effectively controlling these emissions outside of the permit area under specified physical/metereological conditions.
<b>Flooding</b>				
Effects from MTM/VF on flooding of downstream communities	A quantitative flooding analysis is not usually submitted in SMCRA or CWA permit applications. However, SMCRA requires the PIC address flooding. Different approaches for assessment occur in Appalachia states. COB relied on SMCRA permit for issuance of NWP 21.	COB uses 100-year storm for flood analysis. OSM uses 25-year storm for flood analysis; states and industry use varying methods to address flooding in PIC.  WVDEP, working with the COB and OSM, developed surface water analysis requirements for applicants to demonstrate during- and post-mining peak runoff will not contribute to mining.  OSM and COB evaluating approaches for establishing guidelines for consistent SMCRA and CWA analysis of flooding potential.	COB, working with OSM and the state will develop guidelines for calculating peak discharges for design precipitation events and evaluating flooding risk.  OSM will revise regulatory requirements, issue policies or guidance to implement appropriate data collection and analysis to demonstrate surface runoff mining operations do not contribute to flooding consistent with CWA requirements.	OSM and COB will develop guidelines for calculating peak discharges for design precipitation events and evaluating flooding risk.  OSM will revise regulatory requirements, issue policies or guidelines to implement appropriate data collection and analysis to demonstrate surface runoff mining operations do not contribute to flooding consistent with CWA requirements.

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Issue	Baseline (1998)	Alternative A (No Action Alternative (2001))	Alternative B (Most Environmentally Protective Alternative)	Alternative C (Preferred Alternative)
<b>Best Management Practices (cont'd.)</b>				
<b>Community Benefit</b>				

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[illegible][illegible]

[illegible]

Cindy Tibbott  
07/31/02 01:51 PM

To: "Mike Robinson" <MROBINSO@OSMRE.GOV>  
cc: bob@mms.state.va.us, Cassie.Michael@epa.gov,  
Charles.K.Stark@hq2.usace.army.mil, dave\_denemore@hws.gov,  
"Dave Hartos" <DHARTOS@OSMRE.GOV>,  
dvandelinde@mail.dsp.state.vv.us, gconrad@lmcc.las.us,  
Hoffman.William@epamail.epa.gov,  
James.M.Townsend@hq2.usace.army.mil, "Jeff Coker"  
<JCOKER@OSMRE.GOV>, jstump@ghnet.com,  
Katherine.L.Trott@HQ2.USACE.ARMY.MIL, lav@mms.state.va.us,  
Paul.Rothman@mail.state.ky.us, thurster@mail.dsp.state.vv.us,  
rdor.david@epa.gov, surieno.elaine@epa.gov, "Vann Weaver"  
<VWEAVER@OSMRE.GOV>  
Subject: Re: Revised alternatives framework

As promised, we have developed an additional alternative (Alternative 4) that provides for a restriction scenario, creating an "environmentally preferred" alternative.

The first page of the attached WordPerfect document is a rationale behind Alternative 4 and prints on 8 1/2 x 11 paper. The next three pages are the revised alternatives framework, and print on 8 1/2 x 14 paper.

73102Alternative4.wpc

EXHIBIT 36

#### Rationale for FWS "Alternative 4" (i.e., why this is not an alternative that can't be chosen)

- Provides predictability for the regulated community and the public
- Creates a true "level playing field" across states
- Greatly reduces the role of subjective judgments in the process, thereby relieving the burden on the Corps and State agencies from litigation risk
- Reduces the Corps' workload
- Acknowledges that CWA and SMCRA really are consistent with each other in their requirements (SMCRA is not superceding the CWA in any way)
- Avoids setting undesirable CWA precedents (weakening the application of the antidegradation policy and the spirit and intent of the CWA itself; allowing out-of-kind mitigation to buy down impacts that are clearly more than "minimal"; allowing the issuance of NHPs for activities that are clearly more than "minimal"; issuing individual permits for activities that clearly cause "significant degradation")
- Most closely responds to the adverse aquatic and terrestrial impacts documented by the EIS studies
- Industry has demonstrated that it can still mine coal even if fills are restricted to the ephemeral zone (Beech Fork)
- An action item is proposed (although it's currently one of our disputed action items) that would mitigate job losses in the MTM region

#### Advantages to the EIS/NEPA process

- Provides balance in the EIS for the rest of the (permissive) alternatives
- Allows the use of the 35-acre scenario in the EIS, giving us at least one alternative whose effects can actually be quantified in terms of environmental and economic consequences
- Most closely corresponds to the adverse aquatic and terrestrial impacts documented by the EIS studies

~~DRAFT - MTN/VALLEY WILL BE ALTERNATIVES~~

[illegible]

A-102

			Coordinate with States to encourage development of State program general permits (SPGP)	Coordinate with States to encourage development of State program general permits (SPGP)
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From: Mike Robinson  
 To: Bowen, Diana; Casella, Mike; Conrad, Greg; Crum, Matthew; Denemore, Dave; Hamilton, Sam; Hodgkins, Kathy; Hoffman, Bill; Hunter, Russ; Kamp, Rich; Lambert, Butch; Parker, Marrie; Peck, Greg; Rider, Dave; Rothman, Paul; Stark, Kirk; Surtano, Elaine; Tibbott, Cindy; Townsend, Jim; Trott, Kathy; Vandalina, Dave; Vincent, Lee; Walsh, Don  
 Date: Tue, Aug 13, 2002 11:08 AM  
 Subject: Draft Proposed EIS Alternative Framework-Aquatic Actions; SES Issue Resolution Call

Follow-up note: Even though we have no response as of yet from the COE about their availability for the proposed issue resolution conference call, I suggest that we go ahead with the call tomorrow at 10:30 a.m. EDT. If the COE is available, I'm sure that they will tap in to the discussion. Please use the dial-in number 877.218.4412 and enter access code 8669648.

Also, attached is the latest alternative framework, with additions and edits as proposed by FWS.

NOTE TO COE: The other agency executives are trying to nail down their calendars for the upcoming issue resolution call on the alternative framework. Wednesday at 10:30 is the preference. Can someone from the COE please let us know who will be participating from the COE on the conference call and what the COE position is on the existing framework.

P.S. to everyone-Dave Denemore indicated that he would be proposing a modified Alternative 4 this afternoon for discussion with the executives that reintroduces the concept on establishing a restriction with the CWA 404 program on the basis that discharges beyond ephemeral streams cause significant degradation.

Attached is the latest version of proposed Alternatives 1-4 with everyone's edits received to date.

Note to COE-the EPA and FWS Steering Committee members agree that this version represents an accurate portrayal of possible viable contrasting alternatives-although not necessarily that their executives and principals will agree with their positions (i.e., they can not speak to their agencies' ultimate position on the alternatives).

OSM agreed to disagree on Alternative 4 and take the framework forward for ratification/revision by the SES and/or Principals. OSM disagreement stems from our belief (supported by SMCRA Section 702 and past DC Circuit Court decisions on OSM attempts at regulations to establish water-related standards) that SMCRA must defer to the CWA standards regarding activities affecting waters of the US. If Alternative 4 stated that the CWA "backstopped" the SBZ rule with some basis for restricting fills to ephemeral, either through 402, 404, or otherwise (e.g. anti-degradation, fills in perennial or intermittent streams cause significant degradation, advance veto authority, etc.), OSM might be able to support the alternative. As with FWS and EPA, I cannot speak for my agency, but merely give my opinion of what I think my executives and principals might say about the framework.

WVDEP obtained from an opinion on the framework and agreed to wait and see the type of alternative framework that ensues from the issue resolution process.

Since you COE folks couldn't be on the call, the other agencies would like to know where the COE stands with this proposal-thumbs up, thumbs down, or neutral? If thumbs down, what aspect of the alternatives can you not accept and why? We understand that you may not have briefed your principal or executives, but can you tell us what you think they might say about the framework? Knowledge of where the COE stands (along with positions above stated on the call by each agency) will allow us to brief our executives in preparation for an issue resolution call next week. Please respond asap.

Resolving the framework is key to moving forward with the EIS schedule. Two dates/times are proposed for the call: Wednesday, August 14 at 10:30 am or Thursday, August 15th at 2:30 p.m. Can your executives or their designee participate? It appears that the other 4 agencies can do a call on either date, but a preference for Wednesday seems to be emerging. Please rsvp, as to your agency's availability for

EXHIBIT 37

the call.

We will use the normal dial-in number (877.218.4412, 8666546) for the call next week.

The primary agenda focus will be to see if consensus can be reached on the alternative framework. If time permits, we may discuss the need to have another call on several other topics relevant to finishing the draft EIS (e.g., EIS completion process, issue resolution/communication process, need for additional study, disputed actions, schedule, etc.).

CC: Coker, Jeff; Klein, Al

MTM/VALLEY FILL EIS ALTERNATIVES  
August 13, 2003 version  
DRAFT--Deliberative--DO NOT RELEASE (Page 1)

Alternative 7	No Action SOG Programs	Alternative 1	Alternative 2	Alternative 3	Alternative 4
<p>SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p> <p>The SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p>	<p>SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p> <p>The SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p>	<p>SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p> <p>The SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p>	<p>SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p> <p>The SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p>	<p>SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p> <p>The SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p>	<p>SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p> <p>The SHCRA requires that all spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading. SHCRA requires that the spill be contained to the spill area in order to prevent the spill from spreading.</p>



MTM/VALLEY FILL EIS ALTERNATIVES  
August 13, 2002 version  
DRAFT--Deliberative--DO NOT RELEASE (Page 2)

Author: 7	No Ambia 2002 Programs	Alternative 1	Alternative 2	Alternative 3	Alternative 4
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MTM/VALLEY FILL EIS ALTERNATIVES  
August 13, 2002 version  
DRAFT--Deliberative--DO NOT RELEASE (Page 3)

CWA	COE applies regional condition for NWP 21, with 25-acre watershed permit threshold, as an historic measure, to determine whether valley fill activities are processed under NWP or IF.	COE eliminates the 25-acre watershed threshold and proposes regional conditions to limit NWP 21 authorization to riparian stream segments.	COE replaces the 25-acre watershed threshold for IF with a riparian stream threshold for stream segments. NWP 21 authorization is applicable. COE considers the 25-acre watershed threshold as a historic measure to determine whether to process the application as a NWP or IF.	COE eliminates 25-acre watershed threshold for IF. COE retains, to maintain water availability, the EMCCA agency's determination that the operation will have no more than a limited impact on species of the United States when determining whether to process the application as a NWP or IF.	COE and COE issue regulatory guidance that, based on the final determination made in the EIS regarding direct impacts, downstream impacts, and the availability of available riparian stream reaches are proposed to cause or contribute to significant degradation, pursuant to the CWA(3)(1) Criteria. Permit applicants who are determined to be eligible for an individual permit. EIS is riparian stream reaches would be eligible for NWP 21 authorization by the COE, if COE determines, through their permit process, that the values of affected riparian stream reaches, under cannot be compensated, or if the cumulative effect are more than limited, an individual permit will be required. COE will advise NWP applicants to submit their application for NWP 21.
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MTM/VALLEY FILL EIS ALTERNATIVES

August 13, 2002 version  
DRAFT-DO NOT RELEASE (Page 4)

CON develop action protocol to describe the functional value of stream and applicable mitigation	CON implement a riparian stream assessment protocol and develop mitigation requirements	CON allow, to the maximum extent allowable, to SHCRA mitigation and alternative analysis; implement a riparian stream assessment protocol, and develop mitigation requirements	CON allow, to the maximum extent allowable, to SHCRA mitigation and alternative analysis	For NWPs, CON allow, to the maximum extent allowable, to SHCRA mitigation and alternative analysis
CON require mitigation to all new permits	CON require mitigation, consistent with stream protocol, on all permits	CON require mitigation, consistent with stream protocol, on all permits	CON consider all mitigation incorporated in the SHCRA permit and, if necessary, require additional mitigation beyond permit boundaries, consistent with stream protocol	CON consider all mitigation incorporated in the SHCRA permit and, if necessary, require additional mitigation beyond permit boundaries, consistent with stream protocol
Other	Independent collection/analysis of SHCRA and CWA data	Integrate SHCRA and CWA stream impact data requirements	Integrate SHCRA and CWA stream impact data requirements	Develop joint SHCRA/CWA application
		Coordinate with FWS to encourage development of non-programmatic permit permits (NPPs)	Develop joint SHCRA/CWA application	Coordinate with FWS to encourage development of non-programmatic permit permits (NPPs)

DRAFT - DELIBERATIVE PROCESS - PRE-DECISIONAL

Alternatives Matrix for the Draft MTM/VF PEIS  
July 14, 2002

**ISSUE:** The interagency Executive Committee for the PEIS evaluating MTM/VF met by conference call today to address the USFWS recommendation to add a fourth alternative. The group decided to retain the current three-alternative approach and work within the Steering Committee to accommodate, as effectively as possible, the USFWS recommendations into existing Alternative 1.

**BACKGROUND:**

- The interagency Steering Committee developing the MTM/VF PEIS is moving towards the adoption of a revised, three-alternatives framework as the basis for progressing with the PEIS. (a copy of the Alternatives Matrix under discussion is attached)
- When the revised three-alternatives framework was proposed, the USFWS recommended that a fourth alternative be added to the framework, which is also attached. The Steering Committee requested that the Executive Committee consider this recommendation and decide whether a fourth alternative was appropriate.
- After discussion among the agencies today, including representatives from OSM, FWS, EPA, Corps, and the WVDEP, the Executive Committee decided to proceed under the three-alternative approach. In reaching this decision, the agencies also agreed that there are valuable aspects of the FWS proposal that should be further considered by the Steering Committee for incorporation within existing Alternative 1.

**NEXT STEPS:**

- Although it is not FWS preference to proceed with only three alternatives, they agreed to take the lead in drafting potential revisions to existing Alternative 1 that incorporate key aspects of their recommendations and reflect the interagency concerns raised in today's discussion. The revised Alternative 1 will be discussed at the next meeting of the Steering Committee scheduled for August 20<sup>th</sup>. The Executive Committee directed the Steering Committee to complete the revisions to the Alternative Framework by the end of next week. If Steering Committee consensus cannot be reached on revision to Alternative 1 that satisfy FWS concerns, FWS has indicated their intention to elevate this issue for final resolution.
- The agencies also agreed to provide the Principals' Committee with this summary of today's Executive Committee discussion.

Attachment: 8/14/02 Draft Alternatives Matrix

From: <Peck.Gregory@epamail.epa.gov>  
To: Mike Robinson <MROBINSO@OSMRE.GOV>  
Date: Thu, Aug 15, 2002 5:40 PM  
Subject: Executive Committee Discussion

Attached is the final draft version of the summary of the Executive Committee Discussion reflecting comments I received. Please let me know asap if there is something that does not faithfully reflect either the discussion or your comments. I'll plan to get this to the Principals in advance of their scheduled call tomorrow.

I apologize for not turning this around sooner. I'll reiterate that Mike R. does this better than me!

(See attached file: Execcomm.8-14.wpd)

CC: Al Klein <AKLEIN@OSMRE.GOV>, <bcl@mme.state.va.us>, <Charles.K.Stark@hq02.usace.army.mil>, <Cindy.Tibbott@fws.gov>, <dave.densmore@fws.gov>, <rider.david@epamail.epa.gov>, <diane.bowen@fws.gov>, <welsb.donald@epamail.epa.gov>, <dvandelinde@mail.dep.state.wv.us>, <suriano.elaine@epamail.epa.gov>, <gconrad@mcc.isa.us>, <hamilton.sam@fws.gov>, <James.M.Townsend@hq02.usace.army.mil>, Jeff Coker <JCOKER@OSMRE.GOV>, <Katherine.L.Trott@hq02.usace.army.mil>, <hodgkiss.kathy@epamail.epa.gov>, <lsv@mme.state.va.us>, <mamie.parker@fws.gov>, <mcrum@mail.dep.state.wv.us>, <Castle.Michael@epamail.epa.gov>, <Paul.Rothman@mail.state.ky.us>, <rhunter@mail.dep.state.wv.us>, <kampf.rich@epamail.epa.gov>, <Hoffman.William@epamail.epa.gov>

Attachment(s):  
Attachment File 1.wpd  
Attachment File 2.822

## DRAFT - DELIBERATIVE PROCESS - PRE-DECISIONAL

### Alternatives Matrix for the Draft MTM/VF PEIS July 14, 2002

**ISSUE:** The interagency Executive Committee for the PEIS evaluating MTM/VF met by conference call today to address the USFWS recommendation to add a fourth alternative. The group decided to retain the current three-alternative approach and work within the Steering Committee to accommodate, as effectively as possible, the USFWS recommendations into existing Alternative 1.

#### BACKGROUND:

- The interagency Steering Committee developing the MTM/VF PEIS is moving towards the adoption of a revised, three-alternatives framework as the basis for progressing with the PEIS. (a copy of the Alternatives Matrix under discussion is attached)
- When the revised three-alternatives framework was proposed, the USFWS recommended that a fourth alternative be added to the framework, which is also attached. The Steering Committee requested that the Executive Committee consider this recommendation and decide whether a fourth alternative was appropriate.
- After discussion among the agencies today, including representatives from OSM, FWS, EPA, Corps, and the WVDEP, the Executive Committee decided to proceed under the three-alternative approach. In reaching this decision, the agencies also agreed that there are valuable aspects of the FWS proposal that should be further considered by the Steering Committee for incorporation within existing Alternative 1.

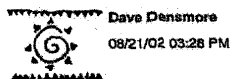
#### NEXT STEPS:

- Although it is not FWS preference to proceed with only three alternatives, they agreed to take the lead in drafting potential revisions to existing Alternative 1 that incorporate key aspects of their recommendations and reflect the interagency concerns raised in today's discussion. The revised Alternative 1 will be discussed at the next meeting of the Steering Committee scheduled for August 20<sup>th</sup>. The Executive Committee directed the Steering Committee to complete the revisions to the Alternative Framework by the end of next week. If Steering Committee consensus cannot be reached on revision to Alternative 1 that satisfy FWS concerns, FWS has indicated their intention to elevate this issue for final resolution.
- The agencies also agreed to provide the Principals' Committee with this summary of today's Executive Committee discussion.

Attachment: 8/14/02 Draft Alternatives Matrix

EXHIBIT 38

A-105



Dave Densmore  
08/21/02 03:28 PM

To: Cindy Tibbott/R5/FWS/DOI@FWS  
cc: Benjamin Tuggle/ARL/R8/FWS/DOI@FWS, Caetia.Michael@epa.gov,  
Hoffman.William@epamail.epa.gov,  
James.M.Townsend@lr02.usace.army.mil,  
Katherine.L.Trott@HQ02.USACE.ARMY.MIL, Mamie  
Parker/R5/FWS/DOI@FWS, morum@mail.dep.state.wv.us,  
rider.david@epa.gov, Sam Hamilton/R4/FWS/DOI@FWS,  
surlano.elaine@epa.gov, Benjamin Tuggle/ARL/R8/FWS/DOI@FWS  
Subject: Explanation for Proposed Modification of Alternative #1

As promised, attached for your further consideration and discussion during tomorrow's conference call is the rationale for our proposed modification of Alternative #1 in the three-alternative framework. Please let me know if you have questions.....DD.

MTM Modified 3-Alt.wpc

Cindy Tibbott



Cindy Tibbott  
08/20/02 09:44 AM

To: Mamie Parker/R5/FWS/DOI@FWS, Sam  
Hamilton/R4/FWS/DOI@FWS, Benjamin  
Tuggle/ARL/R8/FWS/DOI@FWS, Dave  
Densmore/R5/FWS/DOI@FWS, Caetia.Michael@epa.gov,  
rider.david@epa.gov, surlano.elaine@epa.gov,  
Hoffman.William@epamail.epa.gov, Peck.Gregory@epamail.epa.gov,  
Charles.K.Stark@hq02.usace.army.mil,  
Katherine.L.Trott@HQ02.USACE.ARMY.MIL,  
James.M.Townsend@lr02.usace.army.mil  
cc: hodgkiss.kathy@epamail.epa.gov, morum@mail.dep.state.wv.us, "Al  
Klein" AKLEIN@OSMRE.GOV  
Subject:

Correction to the 3-alternative matrix. Obviously, under Alternative 1's CWA section, the second item is supposed to read that intermittent and PERENNIAL streams will be identified as "generally unsuitable" for valley fills. Sorry to have confused everyone...

3altquestionmatrix 081902.wp

#### Background on FWS Proposed Modifications to Alternative 1

- Subpart I of the 404(b)(1) Guidelines (Planning to Shorten Permit Processing Time) describes a process whereby EPA and the permitting authority (e.g., the Corps) may identify sites which will be considered as "areas generally unsuitable for disposal site specification" prior to receipt of a permit application.
- The basis for designating areas unsuitable for disposal is the "...likelihood that use of the area in question for dredged or fill material disposal will comply with..." the Guidelines. However, this "advance identification" of areas unsuitable for fill is not a veto or advance denial; in fact, the regulations state "[t]he identification of areas that generally will not be available for disposal site specification should not be deemed as prohibiting applications for permits to discharge dredged or fill material in such areas." Applicants are not prohibited from applying for a permit, and the Corps is not prevented from issuing a permit.
- The advance identification process is used as a tool to inform potential applicants about the relative ease or difficulty they can expect in applying for a permit to fill within the designated waters, and consequently serves as an incentive to design projects in such a way as to avoid and minimize impacts to those waters.
- Advance identification of disposal areas is also an area-wide planning process that provides the public and potential permit applicants with information on the functions and values of streams and other waters, creates greater regulatory predictability by providing an indication of factors to be considered in permit reviews, and assists other local planning efforts. A large number of advance identification and special area management plans based on such advance identifications have been implemented nationwide.
- The Clean Water Act action proposed for inclusion in Alternative 1 would identify intermittent and perennial stream reaches as "generally unsuitable" for valley fills. In so doing, EPA and the Corps are signaling that, as a general matter, valley fills beyond the ephemeral reach are not likely to meet the requirements of the Guidelines. Given MTM/VF EIS findings on the (previously little-understood) value of headwater streams; the degradation of aquatic life and water quality within and downstream of valley fills; the "persistence and permanence of the effects" (factors the Guidelines say should be given special emphasis); and the anticipated difficulty in developing meaningful compensatory mitigation for these impacts, the "unsuitable" designation is appropriate and logical.
- Under Alternative 1, the Corps would process permits for fills in ephemeral streams in the coalfields region through a nationwide (NW21) or regional general permit. For permit applications to place overburden in intermittent or perennial stream reaches in this region, the Corps would consider site-specific information to determine if the project complies with the Guidelines. The site-specific characteristics would be clearly stated in an EPA/Corps public notice advertising the advance identification. For example, a proposed fill in a stream classified as "poor" or "impaired" based on a biological assessment of benthic invertebrate communities, and for which restoration of the water quality or physical problems causing the impairment is not practicable, would be eligible for an individual permit. In other cases, an individual permit could be issued to fill a stream that is classified as "good" biologically if the applicant proposes in-kind compensatory mitigation in the form of stream restoration and protection within the same watershed (e.g., at the HUC 11 level). For other fills in intermittent or perennial streams (e.g., road crossings, stream diversions, etc.), permits would continue to be processed as before.

EXHIBIT 39

870



William Hoffman  
09/10/2002 10:52 AM

To: mrobinec@osmre.gov, charlos@osmre.gov,  
Dave Densmore@fws.gov, Cindy Tibbott@fws.gov,  
Paul.Rothman@mail.state.ky.us, lsv@mme.state.va.us,  
dvandalinde@mail.dep.state.wv.us, Ray  
George/R3/USEPA/US@EPA, georad@imcc.lsa.us,  
jstump@sfnet.com, rhunter@mail.dep.state.wv.us, Tom  
Slankamp/R3/USEPA/US@EPA,  
James.M.Townsend@LRL02.usace.army.mil, Elaine  
Suriano/DC/USEPA/US@EPA, Kathy.Hodgkiss/R3/USEPA/US@EPA,  
Charles.K.Stark@hq02.usace.army.mil,  
Katherine.L.Trott@HQ02.USACE.ARMY.MIL,  
James.M.Townsend@LRL02.usace.army.mil, Gregory  
Peck/DC/USEPA/US@EPA, Teresah@Lth.usace.army.mil,  
sklein@osmre.gov, Michael.Castle/R3/USEPA/US@EPA,  
jcocker@osmre.gov  
cc: John.Goodin/DC/USEPA/US@EPA, Clay.Miller/DC/USEPA/US@EPA,  
David.Rider/R3/USEPA/US@EPA, John.Forren/R3/USEPA/US@EPA  
Subject: Steering Committee Meeting/Conference Call Summaries

Attached you will find:

1. A meeting summary prepared by Gannett Fleming reflecting the decisions reached at the EIS Steering Committee Meeting held in Pittsburgh on September 4-5, 2002, and
2. Notes from our September 9, 2002 conference call reflecting: a) the Steering Committee's position on the need for a third party review of the economic studies; b) the EIS schedule; c) budgetary needs to complete the EIS; and d) communications.

If you see anything that seems inaccurate, please let me know ASAP!

Bill



EIS Meeting 09 04 02.wp EIS Conference Call 090902.w

## September 9, 2002 EIS Steering Committee Conference Call

Members Present: Kathy Trott, Jim Townsend, Jeff Coker, Dave Hartos, Dave VandeLinde, Russ Hunter, Dave Densmore, Dave Rider, John Forren, Bill Hoffman, Elaine Suriano

### Discussion Topics

#### 1. Independent Review of Economic Studies

The discussion revolved around: a) whether the flawed Phase I and II economic studies should be included in the appendices of the EIS with the other completed technical studies, and b) whether an independent review is necessary to confirm the flaws identified by the agencies.

a. The reason for not revising the flawed Phase I and II economic studies centers on the fact that the studies are no longer essential for portraying the differences between the alternatives being analyzed in the EIS. The committee agreed that the studies would have been relevant had the original restriction alternatives proven to be viable alternatives, but since they are not viable, revising the studies is not essential for the completion of the EIS.

Even though the studies are no longer essential for portraying the differences between the alternatives being analyzed in the EIS, and even though they are flawed, it is the recommendation of the EIS Steering Committee that they be included in the Appendix with a detailed explanation of their technical deficiencies and why they are not being revised (ie- they are no longer essential to the completion of the EIS). Since the studies were released under FOIA, the Steering Committee believes that not including them in the Appendix would raise questions concerning the integrity of the document.

b. The EIS Steering Committee does not see added value for this EIS in securing a third party review to confirm the flaws in the Phase I and II economic studies. The agencies have sufficient technical expertise to identify and describe the deficiencies to the discerning public. The economic studies could be reviewed independently from the EIS if the Principals' determine the need to satisfy legal or public perception concerns.

#### 2. EIS Schedule

- |  |               |
|--|---------------|
| • Contractor Provides DEIS to EIS Steering Committee | November 2002 |
| • Interagency Review and Concurrence                 | December 2002 |
| • GPO Printing                                       | January 2003  |
| • Release EIS  | February 2003 |
| • Public Meeting/Hearing                             | March 2003    |
| • Comment Period Ends                                | May 2003      |
| • Compile/Sort Comments                              | July 2003     |

EXHIBIT 40

A-14

- Prepare Response Document January 2004
- Prepare FEIS March 2004
- Prepare Record of Decision May 2004

### 3. Budget Needs

- 100k Update aquatic statistical studies using information on ages of fills, sizes of fills, new landcover/landuse information, etc.
- 125k Additional GIS work to digitize permits and landcover in VA and KY; and to create stream coverages
- 500k Contractual needs- compile/sort comments; provide additional analyses; attend and provide information at public meetings/hearings; prepare FEIS
- 150k Third party review of Phase I and II economic studies
- 75k Plaintiff's experts per settlement agreement

### 4. Communications

The EIS Steering Committee believes there is a need (with DOJ concurrence) to create another Bulletin describing the current status of the technical studies. The technical studies have been described in previous Bulletins and periodic progress reports have been published on the EPA website, but the status of the studies has not been updated for several years. This Bulletin would describe which studies have been reviewed and finalized, which studies are considered flawed and unreliable; and which studies are still in progress. Placement of the completed studies onto the EPA web site to mitigate new FOIA requests was discussed and dismissed.

The EIS Steering Committee agreed to channel all questions regarding the EIS to the EPA press office, attention Bonnie Smith, at 215 814-5543 or Smith.Bonnie@epa.gov.

From: Mike Robinson  
 To: MTM/VF EIS Steering Group/Executives  
 Date: Fri, Sep 20, 2002 3:12 PM  
 Subject: Executive Conference Call Agenda-9/23/02, 9-10 am

Attached you will find an agenda and information on each topic for Monday's call. Please try and read this document before the call to expedite the discussion. Sorry this is so late in the day, but other duties called.....

While the format may not follow Mike Castle's suggestions precisely, I believe that all of the information he was looking for on background, issues, justifications, and Steering Committee recommendations are largely captured. I did not have time to prepare specific pro/cons on particular decisions, but I believe that the discussion provided will assist in logical/informed decisionmaking.

Because we only have one hour on Monday, I would be most appreciative if you would begin to call in before 9 am, so that we may start promptly at 9. I will open the lines for the call around 8:55 am. Reminder-to connect for the call: dial 877.216.4412 and enter access code 866654# to join.

Talk to you Monday. Have a great weekend!

Michael K. Robinson  
 Chief, Program Support Division  
 Appalachian Regional Coordinating Center  
 Office of Surface Mining  
 US Department of the Interior  
 (412) 937-2882 fax (412) 937-3012  
 3 Parkway Center  
 Pittsburgh, PA 15220

EXHIBIT 41

**MTM/VF EIS Executive Meeting Agenda**  
**September 23, 2002 Conference Call**  
**Draft-Deliberative-Pre-Decisional-Do Not Distribute-Page 1**

9:00-9:05 a.m. (NOTE: Participants: Steering/Executive Committee members)  
 Introductions; objective of call; and adoption/revision of agenda

**Objective of call:** To maintain the current February 2003 DEIS publication schedule (see agenda item on schedule below), the EIS Steering Committee (SC) must receive executive ratification or revision of recent SC decisions about EIS alternatives, schedule, technical study disposition, funding, and communication.

9:05-9:10 a.m. Process Explanation: Executive Review  
 Decision Needed by 9:30: Approval of EIS Alternatives

**Background:** The executives instructed the SC to attempt to construct the alternatives for the EIS in a framework based largely on coordinated decision making for SMCRA and CWA—with no alternative restricting fills. The SC, again based on executive direction, incorporated an action proposed by FWS into the alternatives that would utilize the advance ID process to establish a rebuttable presumption precluding fills in any intermittent and perennial streams. EPA and COE stated the FWS concept was not consistent with the historical implementation of and legal challenges to the ADID rule. A revised action to use ADID to deter fills in streams with certain characteristics and high value was included in the alternatives.

The alternative framework is the heart of the DEIS and key to SC construction of the "consequences" section. The draft Chapter IV (alternatives) was sent to the executives for review and comment on Friday 9/20, by e-mail. The SC requests feedback from the executives by 9/30/02 to enable finalization of the alternatives so that DEIS preparation can proceed according to the schedule. Disputed actions are highlighted in the draft Chapter IV for a final executive decision on inclusion or deletion.

9:10-9:16 am Decision Needed: Executive Ratification of EIS Schedule

**Background:** A cabinet level official has stated that release of the DEIS will occur in February 2003 and the principals and executives have underscored this objective. The SC developed a schedule and implemented contracting changes to achieve this target. The schedule is extremely aggressive and must be accompanied by agency commitments of appropriate levels of resources (staff and funds) to meet the intermediate deadlines supporting the overall schedule. There are some gaps in EIS data for which the SC has begun developing designs or performing ancillary analyses that will not be ready within the current DEIS schedule (see agenda discussion on funding, below). However, some concern has been expressed in the NEPA context that failure to include the data in the DEIS might possibly result in the need for a supplemental EIS—if comments on the gaps are received following public review. The SC generally views these gaps as not strongly relevant to informed alternative analysis by the public, and thus, not a limiting factor to publication of the draft on schedule.

**EIS Schedule:**

Contractor Provides DEIS to EIS Steering Committee	November 2002
Interagency Review and Concurrence	December 2002
CFO Review	January 2003
Release DEIS	February 2003
Public Meeting/Hearing	March 2003
Comment Period Ends	May 2003
Complete/Sort Comments	July 2003

**MTM/VF EIS Executive Meeting Agenda**  
**September 23, 2002 Conference Call**  
**Draft-Deliberative-Pre-Decisional-Do Not Distribute-Page 2**

Prepare Response Document	January 2004
Prepare PEIS	March 2004
Prepare Record of Decision	May 2004

9:16-9:26 am Decision Needed: Executive concurrence with justification for (and identification of) funding

**Background:** The issue of limiting or qualified technical studies has been discussed by agency heads, who requested the SC inform the need for additional funding to complete the EIS. The items below represent the SC estimates at this time of areas requiring additional monies.

**\$150k** Third party review of Phase I and II Economic Studies. Data from these studies have been represented as factual to Federal District Court in plaintiff's briefs; and cited in the media as conclusive findings of the government. The agencies confirmed serious limitations with the findings and are proceeding to develop the EIS without relying on the information—other than for providing very general indications. The studies are now irrelevant to analyzing the alternatives, but were, if not flawed, relevant to alternatives previously under consideration and released to the public under FOIA. The SC believes, if the studies are not included in the DEIS (with appropriate qualification), that public confusion and controversy over the omission would arise during the comment period. The SC does not feel the studies require independent review prior to publication of the DEIS, and believe the findings can be dismissed by credible agency qualifications statements in the document. While independent review may add credence to supporting the SC conclusions of the value of the studies, the SC defers to the executives as to the necessity of such expense and the timing, if done. The time necessary to conduct third party review, because of high probability of a CR for FY 2003 funding, as well as the necessary contracting processes, would preclude meeting the February 2003 DEIS deadline. An independent review could be included in the FEIS. The executives may also wish to consider, if the review is performed, whether addressing the studies' reliability must be linked to the EIS process.

**\$100k** Update Aquatic Statistical Study using information on ages/sizes of fish and other mining/human disturbances. EPA's Cincinnati laboratory prepared the existing WV stream statistical evaluation that concluded strong correlation between mining and downstream impacts. However, the report identifies data gaps, resulting in inconclusive findings regarding cause and effect. OSM is performing GIS mapping to indicate watershed disturbances upstream of monitoring stations to allow analysis of possible reasons for surface water mineralization and benthic organism shifts occurring below mined sites as compared to conditions in reference streams. However, EPA's laboratory (or a contractor) will require funding to perform the additional statistical review of the original study findings in light of the newly gathered information. This effort can not be completed within the next 30-60 days, and thus can not be included in the DEIS. The SC recommends approval of funding for this effort.

**\$125k** Additional GIS work for Cumulative Impact Study (CIS) analysis in WV, TN, VA, and KY. The GF draft CIS was based on flawed economics study information and limited to the WV portion of the EIS study area. The SC agrees that the CIS should encompass all states in the EIS study area. Kentucky digital footprints of surface mining permits; runoff accumulation modeling of stream flow path lengths; and, interpreted current satellite

# **MTM/VF EIS Executive Meeting Agenda** **September 23, 2002 Conference Call**

**Draft-Deliberative-Pre-Decisional-Do Not Distribute-Page 3**

*imagery (vintage 2002) for WV, KY, TN, and VA do not exist. To complete a CIS with consistent data sets and analysis can not be performed by the Dec. 2002 DEIS finalization due date. [Note: The current approach for the CIS was a result of a 3-2 split by the SC. EPA and FWS voted against the approach because the CIS does not project specific locations of future mining. FWS believed future mining locations by watershed should be prepared. OSM, COB, and WVDEP concluded that identifying specific locations for future mining was not advisable, feasible, or necessary as exhibited by the flawed Phase I Economics results and the inability to consider certain crucial mine planning factors using GIS analysis. This cost estimate is based on the SC 3-2 majority decision and does not propose to delineate specific potential future mining locations.] The SC recommends approval of funding for this effort.*

**\$500k EIS Preparation Contract.** Contractual needs to compile/sort comments; provide additional analyses; attend and provide information at public meetings/hearings; prepare FEIS. *Preparation of the DEIS will consume all remaining dollars in the GF contract by 1/03. No additional funding can be applied to the contract. The contract cannot be extended. EPA does not yet have a renewed "blanket" NEPA support contract. The SC recommends approval of funding for this effort.*

**\$75k Plaintiffs' experts review/analysis.** *The December 23, 1998 settlement agreement called for the agencies to use subject matter experts in development of the EIS. As the EIS is finalized and responses to comments assimilated, the plaintiffs' experts are likely to be involved. Contracting vehicles are not funded to cover experts' expenses. The SC recommends approval of funding for this effort.*

**9:26-9:30 p.m.** Decision Needed: Executive concurrence with decision for all media inquiries to be addressed by EPA Region III public affairs; [Bonnie Smith, at 215 814-5543 or Smith.Bonnie@epa.gov]

**Background:** *To assure that information on the MTM/VF EIS was stated consistently (as opposed multiple versions from each agency), the SC agree to create a central point of contact for inquiries. The SC also agreed to prepared a "Bulletin 5," to be posted on the EPA Region III web site to provide the public status of the various technical studies and the ratified EIS schedule. The last Bulletin (#4) was posted in November 2000. [NOTE: EPA has concerns with this approach to be discussed with the Executive Committee.]*


**9:30-10:00 a.m.** (NOTE: Participants limited to Executive Committee members; SC leaves the call) Executive Committee discussion

**10:00 a.m. Adjourn Call**

**Gregory Peck**  
09/30/2002 05:03 PM

To: John Goodin/DC/USEPA/US@EPA, Clay Miller/DC/USEPA/US@EPA  
cc:  
Subject: FWS Comments on Chapter IV

Looks like FWS is conceding the alternatives framework?  
— Forwarded by Gregory Peck/DC/USEPA/US on 09/30/2002 05:02 PM —


 **William Hoffman**  
09/30/2002 04:43 PM

To: Kathy Hodgkiss/R3/USEPA/US@EPA, Gregory Peck/DC/USEPA/US@EPA, John Goodin/DC/USEPA/US@EPA, Clay Miller/DC/USEPA/US@EPA, Palmer Hough/R4/USEPA/US@EPA  
cc:  
Subject: FWS Comments on Chapter IV

FYI

**William J. Hoffman (3ES30)**  
Director, Office of Environmental Programs  
Environmental Services Division  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-2995

— Forwarded by William Hoffman/R3/USEPA/US on 09/30/02 04:42 PM —


 **Dave\_Densmore@fws.gov**  
09/30/02 04:23 PM

To: mrobinso@osmre.gov, aklein@osmre.gov, William Hoffman/R3/USEPA/US@EPA, John Forren/R3/USEPA/US@EPA, Elaine Suriano/DC/USEPA/US@EPA, Michael Castle/R3/USEPA/US@EPA, Katherine.L.Trott@HQ02.usace.army.mil, dvandelinde@mail.dep.state.wv.us, rhunter@mail.dep.state.wv.us  
cc: Mamie\_Parker@fws.gov, Benjamin\_Tuggle@fws.gov, Cindy\_Tibbott@fws.gov  
Subject: FWS Comments on Chapter IV

Attached are FWS comments on Chapter IV. These comments are primarily intended to summarize the views of both our Steering and Executive Committee members on the proposed framework, as it is explained in this chapter. Although the comments are not especially favorable (we gave it half a star), we do not intend to argue this issue further. DD.

(See attached file: MTM EIS Chapter IV.wpd)

**David Densmore**  
Supervisor, Pennsylvania Field Office  
U.S. Fish and Wildlife Service  
315 S. Allen St., Suite 322  
State College, PA 16801-4850  
(814) 234-4090 x233 FAX: (814) 234-0748

 MTM EIS Chapter IV.wpd

**EXHIBIT 42**



FWS Comments on 9/20/02 Draft of Chapter IV (Alternatives)

The Fish and Wildlife Service has reviewed the September 20 draft of Chapter IV for the MTM/VF EIS. We previously proposed a four-alternative scenario that included consideration (not selection) of at least one alternative to restrict, or otherwise constrain, most valley fills to ephemeral stream reaches by employing the significant degradation or advance identification (ADID) provisions of the 404(b)(1) Guidelines. Our intent was to provide for consideration of at least one alternative that "developed agency policies, guidance, and coordinated decision-making processes" and minimized the impacts of mountaintop mining and valley filling on waters of the U.S. and fish and wildlife resources; a two-part goal established by the settlement agreement that we believe the three-alternative approach failed to accomplish. Our proposed approach was subsequently voted down within the Executive Committee in part because a decision appears to have been made that even relatively minor modifications of current regulatory practices are now considered to be outside the scope of the EIS process. The current three-alternative framework was adopted, but incorporated only a very limited ADID concept that does not meet our objectives. The September 20 draft retains the deficiencies contained in the previous three-alternative framework, and the full draft of Chapter IV confirms our concerns. Therefore, we continue to object to the use of this approach. However, since the agencies are proceeding based on adoption of this approach, we do not believe that elevating this issue for higher level review would be helpful or productive. The following general comments are intended to provide you only with our sense of how problematic the proposed alternatives framework has become.

Now that the basic concept has been more fully elaborated in the September 20 write-up, it is painfully obvious to us that there are no differences between the three action alternatives that can be analyzed in a NEPA context. Table IV-2 (Comparison of Alternatives) underscores this fundamental shortcoming: Each of the three action alternatives offers only meager environmental benefits (thus a "two-star rating," as with a budget hotel or B movie), and there is no difference between them -- even in their degree of meagerness. The relative economic effects of these alternatives are similarly indistinguishable. The reader is left wondering what genuine actions, if any, the agencies are actually proposing.

Table IV-1 states that the alternatives would "minimize" the adverse effects of mountaintop mining and valley fill construction; the "analysis of alternatives" section states that "all three alternatives will result in greater environmental protection that will fulfill the agencies EIS objectives." As we have stated repeatedly, it is the Service's position that the three "action" alternatives, as currently written, cannot be interpreted as ensuring any improved environmental protection, as stipulated in the settlement agreement, let alone protection that can be quantified or even estimated in advance for purposes of a NEPA analysis. Without providing clear indications of how the Corps would evaluate projects and reach decisions through either the nationwide permit or individual permit processes, and how the SMCRA agency would make its decisions under Alternative 3, the public will not be able to deduce whether impacts to waters under any of these alternatives would be any different than the no action alternative. Furthermore, the results of implementing individual action items whose "actions" do not produce an outcome ("will continue to evaluate," "will work with the states to establish," "will continue to assess," "will continue to refine"), and of developing "Best Management Practices" whose use will be

voluntary, are not likely to effect quantifiable, or even recognizable, improvements in environmental protection.

As we have already discussed *ad nauseum*, NEPA regulations describe the Alternatives section as "the heart of the environmental impact statement" which, in combination with the Affected Environment and Environmental Consequences sections, should "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." Even after considering the necessarily broad, programmatic nature of this document, we have clearly failed to meet these standards.

The EIS technical studies carried out by the agencies -- at considerable taxpayer expense -- have documented adverse impacts to aquatic and terrestrial ecosystems, yet the proposed alternatives presented offer no substantive means of addressing these impacts. The alternatives and actions, as currently written, belie four years of work and the accumulated evidence of environmental harm, and would substitute permit process tinkering for meaningful and measurable change. Publication of a draft EIS with this approach, especially when the public has seen earlier drafts, will further damage the credibility of the agencies involved.

From: <Forren.John@epamail.epa.gov>  
To: Dave Hartos <DHARTOS@OSMRE.GOV>  
Date: Fri, Oct 4, 2002 3:04 PM  
Subject: Re: Reminder: Comments on Draft Chapter IV Rewrite Up Due Today (Oct4th)

Dave:

Attached below are my comments, both in MS Word and Wordperfect. Bill Hoffman has not had the chance to review these comments, however. Please let me know if you have questions. I will be out of the office Monday through Wednesday but can be reached through my cell phone (215-275-5345). Thanks.

John

(See attached file: PDEIScmntsJF.doc)(See attached file: PDEIScmntsJF.wpd)

Dave Hartos  
<DHARTOS@OSMRE.GOV> To: John Forren/R3/USEPA/US@EPA,  
William V> Hoffman/R3/USEPA/US@EPA, David  
Rider/R3/USEPA/US@EPA, Elaine Suriano/DC/USEPA/US@EPA, Cindy Tibbott@fws.gov,  
10/04/02 10:42 AM dave\_densmore@fws.gov, jstump@GFNET.com,  
Katherine.L.Trott@HQ02.USACE.ARMY.MIL,  
James.M.Townsend@lr102.usace.army.mil,  
dvandelinde@mail.dep.state.wv.us,  
rhunter@mail.dep.state.wv.us, Jeff Coker  
<JCOKER@OSMRE.GOV>, Mike Robinson  
<MROBINSO@OSMRE.GOV>  
cc:  
Subject: Reminder: Comments on Draft Chapter IV Rewrite  
Up Due Today (Oct 4th)

Dear Steering Committees et al.,

Just a reminder that comments from you or your executives is due to me today. Thanks!!

dave

CC: <Cindy.Tibbott@fws.gov>, <dave.densmore@fws.gov>,  
<rider.david@epamail.epa.gov>, <dvandelinde@mail.dep.state.wv.us>,  
<Suriano.Elaine@epamail.epa.gov>, <James.M.Townsend@lr102.usace.army.mil>,  
<JCOKER@OSMRE.GOV>, <jstump@GFNET.com>,  
<Katherine.L.Trott@HQ02.USACE.ARMY.MIL>, <MROBINSO@OSMRE.GOV>,  
<rhunter@mail.dep.state.wv.us>, <Hoffman.William@epamail.epa.gov>,  
<Hodgkiss.Kathy@epamail.epa.gov>

Attachment(s):  
Attachment File 1.doc  
Attachment File 2.wpd  
Attachment File 3.822

EXHIBIT 43

#### John Forren's comments on the Alternatives Section

These comments are based on my review of the Alternatives Section and the DEIS in general:

#### GENERAL COMMENTS

1. It has been explained to me that the Principals have made their decision regarding the set of alternatives carried forward for detailed analysis and we must move forward from there. While I fully understand the need to move forward, I do feel compelled to identify some vulnerabilities as I see them so that we can be prepared for the potential reactions from the commentators and litigators.
2. Lead federal agency. There should be a solid explanation in the EIS as to why EPA is the lead federal agency and not OSM or the Corps. Granted, EPA shares regulatory authority relative to 404 with the Corps but in terms of the bulk of the day-to-day regulatory responsibility for mountaintop mining activities, OSM or the Corps would clearly be the lead from a public perspective. We need to be prepared for such comments.
3. Range of Alternatives. The range of alternatives should be based on the purpose and need for the action. Granted, we have to abide by the consent decree but because this is a DEIS and citizens have standing to sue under NEPA, we need to ensure we satisfy the spirit and intent of NEPA, particularly and especially from a process standpoint where courts have often granted relief to plaintiffs against the federal government. As I understand the general purposes, the action is intended to address regulatory deficiencies and environmental impacts. The regulatory piece seems to be adequately addressed throughout these alternatives but it will not be clear to the public that any concrete steps are being proposed among the alternatives that address directly the environmental impacts.

The alternatives in the preliminary DEIS released to the public under FOIA have already set expectations that there will be similar concrete alternatives to address environmental impacts in the final DEIS. On its face, the set of alternatives studied in detail in this DEIS do not represent the full range of alternatives and we should explain why this set of alternatives is unlike the set released under FOIA. It's one thing to include such alternatives in the DEIS and not choose one as a preferred alternative or not choose one as the selected action in the Record of Decision. It's another thing altogether to generate alternatives that may give the appearance we're obscuring and de-emphasizing the ones that address directly environmental impacts.

This is the kind of a NEPA process issue that can leave us legally vulnerable and we should therefore shore up the language of the existing alternatives with concrete actions that address directly environmental impacts while still holding true to the directives handed down from the principals. Otherwise, we are potentially vulnerable to a public perception that the federal government has spent all this time, effort, and millions of tax dollars to arrive at set of alternatives that focuses on better permit coordination between

SMCRA and 404. We need to make more clear how each of the alternatives, and the data and analyses generated as part of the EIS, not only addresses the regulatory process issues but the environmental impacts as well.

The alternatives as written are too soft. There is too high a potential for reviewers to focus on the sense that the agencies will strive to do this or try to do that. There will be an expectation that if a particular alternative will result in clear definitive actions.

4. Alternatives Not Carried Forward for Detailed Analysis. Somewhere in the Alternatives section, there should be a discussion and description of those alternatives not considered in detail. Again, the preliminary DEIS released under FOIA contained alternatives not included among those considered in this EIS. There should be a clear explanation of early alternatives considered and why those were not considered in this DEIS.
5. Programmatic EIS. There should be an explanation somewhere in the document as to what a programmatic EIS is, what that means in terms of the alternatives presented, and whether any of the agencies intend to tier other EISs to this one.
6. EIS Organization. Many of the narratives for each alternative comprise information on background, history, and purpose and need for the action and should therefore be placed in the Purpose and Need, Background, or Existing Environment sections of the EIS. The Alternatives Section is too cluttered and confusing with this information in it. The Purpose and Need section sets the stage for the Alternatives section and the two sections should be linked that way. The Alternatives section should focus on the alternatives with references to the links to the Purpose and Need discussions with other background/history information placed in the Introduction.

#### DETAILED COMMENTS

1. A. Introduction. The first sentence in the first paragraph mentions that the agencies and public identified numerous environmental and community impact concerns. However, in presenting the agencies' review of their respective regulatory programs, the second paragraph avoids mention of the term "environmental" but seems to imply it in such phrases as "adequate regulatory controls" and "minimize concerns and adverse effects of mountaintop mining." It may seem minor but it is something that jumped out at me.
2. Table IV-1: This table more than any would likely leave a reviewer feeling that all the action alternatives are essentially the same. Every one begins with "...cross program actions to minimize adverse effects..." There should be a better explanation and use of key words to convey that each is unique. Again, this table suggests that all the money and effort invested in this project resulted in little more than better permit coordination.
3. B. Analysis of Alternatives: The first paragraph, 2<sup>nd</sup> sentence states that each of the alternatives will provide greater environmental protection than now exists. However, a reviewer would be hard pressed to find validation of this in the discussion of each alternative. Much of the discussion of enhanced environmental protection is in the abstract and left to the reviewer's imagination. We need to bolster the discussion of environmental benefits and clearly link these to each alternative set forth in the document. Perhaps a table should be included that lays out our projections for environmental benefits as a result of each alternative. There is an unbalanced focus on better permit coordination throughout the Alternatives section.
4. B. Analysis of Alternatives: The first paragraph includes the statement that "the principal distinction between (sic) the three proposed alternatives is which agency will take the lead role..." A question that will surely be posed by some in the public is "They did an EIS to determine which federal agency should take the lead role?" This sentence again highlights the limited range of alternatives and should be removed with more effort placed on distinguishing among the alternatives.
5. Alternative 1, Page 5: The 250-acre threshold is mentioned. Is this threshold explained somewhere in the document? Also, first sentence, "...those fill proposed..." should be "...those fills proposed..." Third sentence, "...the amount...and the level...required by the 404(b)(1) guidelines is..." should be "...guidelines are..." Are the Guidelines explained somewhere in the document? Because the Section 404(b)(1) Guidelines are regs published in the federal register, Guidelines should be capitalized when referring to Section 404(b)(1), which is done in some, but not all, parts of the documents.
6. Page 11, last paragraph, first sentence: Included "generally" in describing areas unsuitable for fill in the context of ADIDs. This sentence should be reworded to make clear that such designations will reduce the likelihood that aquatic disposal would comply with the Guidelines.
7. Page 13, Stream Impairment: Much like the other parts of the Alternatives section, the bulk of this text should be elsewhere in the document, not with the Alternatives discussion. In addition, more information is needed to explain why causal relationships could not be identified. This first paragraph seems "naked" and out of place in the discussion of alternatives.
8. Page 15, Stream Biomonitoring, West Virginia: "Baseline benthic surveys are normally always conducted..." "Normally" or "always" should be deleted as the two are mutually exclusive.
9. Page 23, first paragraph. This paragraph must set the record for length in the Alternatives section. It is shy only one sentence fragment from filling the entire page. Again, I don't believe the word "alternative" is used once in this lengthy paragraph despite its placement in the Alternatives section.
10. Page 38, Airborne Dust, first paragraph, 2<sup>nd</sup> sentence: "...did not find evidence of that off site..." should read "...did not find evidence that off site..." In the fifth sentence, I'm not sure why the term "identified" is used: "The most significant sources of emissions for this category of activities are identified removal and haul trucks."

From: <Peck.Gregory@epamail.epa.gov>  
To: <MROBINSO@OSMRE.GOV>  
Date: Tue, Oct 22, 2002 1:57 PM  
Subject: Draft Exec Comm. Summary

Folks,

Here's a summary of the recent Executive Committee meeting in Shepherdstown WV. Please review and provide me with comments as soon as possible.

Thanks,  
Greg

(See attached file: ECSummary10-16.wpd)

CC: <AKLEIN@OSMRE.GOV>, <miller.anne@epamail.epa.gov>, <Benjamin.Tuggle@fws.gov>, <Charles.K.Stark@HQ02.USACE.ARMY.MIL>, <Cindy.Tibbott@fws.gov>, CHARLIE STUREY <ctsurey@mail.dep.state.wv.us>, <Dave.Densmore@fws.gov>, <DHARTOS@OSMRE.GOV>, <welsh.donald@epamail.epa.gov>, <suriano.elaine@epamail.epa.gov>, <James.M.Townsend@HQ02.usace.army.mil>, <JCOKER@OSMRE.GOV>, <Forren.John@epamail.epa.gov>, <Katherine.L.Trott@HQ02.USACE.ARMY.MIL>, <hodgkiss.kathy@epamail.epa.gov>, LEWIS HALSTEAD <lhalstead@mail.dep.state.wv.us>, <mamie.parker@fws.gov>, Matt Crum <mcrum@mail.dep.state.wv.us>, <Castle.Michael@epamail.epa.gov>, <MROBINSO@OSMRE.GOV>, RUSS HUNTER <rhunter@mail.dep.state.wv.us>, <kampf.rich@epamail.epa.gov>, <Hoffman.William@epamail.epa.gov>, <dandelinde@mail.dep.state.wv.us>

Attachment(s):  
Attachment File 1.wpd  
Attachment File 2.822

Deliberative Process - Pre-decisional - Not for Release

Discussion Summary  
MTM/VF EIS Executive Committee  
October 16, 2002 - Shepherdstown, WV

I. Attendees:

Al Klein (OSM)  
Mark Sudol, Kirk Stark (COE)  
Mamie Parker (FWS)  
Lewis Halstead (WVDEP)  
Mike Castle, Greg Peck (EPA)

II. Key Discussion/Summary:

- Steering Committee Update: members of the interagency Steering Committee updated the Executive Committee (EC) on the status of key issues and requested EC attention on several matters. The following summary reflects the discussion of the EC in response to the update.

1. Economic Studies: The EIS agencies and one of the contractors (Hill and Associates) responsible for developing the economic analyses for the MTM/VF EIS, are scheduled to conduct a public meeting in Nitro, WV on October 17, 2002. The agencies have requested input from key stakeholders in the EIS, including the environmental community and coal industry, on the validity of key conclusions contained in the Phase 1 & Phase 2 economic studies. The agencies are concerned that as a result of problems with the original analyses, including critical assumptions used in the Phase I studies, that certain aspects of the final economic report are not valid. After a lengthy discussion, the EC recommended that a new Hill and Associates review of the economic studies proceed as recently proposed by the Steering Committee but, with the counsel of the EC, that the focus remain on an evaluation of the current studies and the development of sensitivity analyses for these studies.

2. National Academy of Sciences Study: The Steering Committee has been coordinating with staff at the NAS to consider opportunities for a more formal NAS review of the economic studies. Unfortunately, the NAS has indicated that such a study would cost an estimated \$800,000.00 and could not be completed before the summer of 2003. Recognizing this expense and that the study would not be ready in time for inclusion in the DEIS, the EC recommends that the Steering Committee rely on the ongoing Hill and Associates review with stakeholder participation, and additional Steering Committee work, rather than initiate the new NAS study.

3. EIS Alternatives Analysis: The Steering Committee has recognized the need to continue to clarify the EIS alternatives framework focusing on efforts to improve the contrast between the alternatives and to better quantify the environmental results that are attributable to the alternatives. While the EC remains committed to the existing three alternatives framework,

EXHIBIT 44

the Committee agrees that additional efforts to better distinguish between the alternatives and to improve the quantification and qualification of the environmental benefits of each alternative would contribute to a more effective EIS.

4. Resources/Schedule: The EC discussed the need to ensure the agencies have committed appropriate resources for completing the draft EIS on the current schedule. The EC has directed the Steering Committee to develop a critical path of the key tasks necessary for an early spring 2003 completion of the DEIS and to assign the resources necessary to meet the schedule. The EC has recommended that an interagency conference, including the SC & EC representatives, be scheduled for the week of 10/21/02 to review the critical path development and to provide focus on this issue, to monitor progress, and to identify or assign the additional resources which may be needed.

### III. Next EC Meeting

The EC will reconvene in approximately two weeks.



Townsend, James M  
LRL02  
<James.M.Townsend  
@tr02.usace.army.mil  
>

10/31/02 12:40 PM

To: "Cindy\_Tibbott@fws.gov" <Cindy\_Tibbott@fws.gov>,  
Forren.John@epamail.epa.gov  
cc: "Dave Denmore (E-mail)" <dave\_denmore@fws.gov>, Dave Hartos  
<dhartos@osmre.gov>, Dave Vandellinde  
<dvandellinde@mail.dep.state.vv.us>,  
Hoffman.William@epamail.epa.gov, Russ Hunter  
<hunter@mail.dep.state.vv.us>, "Townsend, James M LRL02"  
<James.M.Townsend@tr02.usace.army.mil>, "Jeff Coker (E-mail)"  
<jcoker@osmre.gov>, "Stump, Jennifer M." <jstump@GFNET.com>,  
"Trott, Katherine L HQ02"  
<Katherine.L.Trott@HQ02.USACE.ARMY.MIL>, Les Vincent  
<dev@mms.state.va.us>, Mike Robinson <mrobinso@osmre.gov>, Paul  
Rothman <paul.rothman@mail.state.ky.us>,  
Rider.David@epamail.epa.gov, Suriano.Elaine@epamail.epa.gov  
Subject: RE: Alternatives Format

Based on our discussions about how the alternatives may be revised to show greater difference, I took the summary table on page 2 in Chapter IV and revised it based on my understanding of what I think I heard. I kept the Corps position that our evaluation is limited to waters of US.

JT

#### -----Original Message-----

From: Cindy\_Tibbott@fws.gov [mailto:Cindy\_Tibbott@fws.gov]  
Sent: Wednesday, October 30, 2002 3:14 PM  
To: Forren.John@epamail.epa.gov  
Cc: Dave Denmore (E-mail); Dave Hartos; Dave Vandellinde;  
Hoffman.William@epamail.epa.gov; Russ Hunter; Jim Townsend (E-mail);  
Jeff Coker (E-mail); Stump, Jennifer M.; Kathy Trott (E-mail); Les  
Vincent; Mike Robinson; Paul Rothman; Rider.David@epamail.epa.gov;  
Suriano.Elaine@epamail.epa.gov  
Subject: Re: Alternatives Format

Greetings all,

Hope you had a better drive back from Camp Hill than I did last night; I could have done without the October snow.

John's Alternatives Format got me thinking about some of our discussions this week about how much detail we need to put into the Alternatives, and I typed up some concerns - please see the attached file.

EXHIBIT 45

alternativesdiscussion.wpd  
Attachment to CTRB0015

10/30/02 e-mail

(See attached file: MTMAAltFormat.wpd)

## Chapter II: ALTERNATIVES

### A. Actions Considered to Address Issues Identified in Scoping

This would be the section linking the scoping discussion in the Purpose and Need section with the array of all actions developed to address those issues.

### B. Screening of Actions and Development of Alternatives

This would be the section explaining why some actions were set aside, how some actions were already accomplished, and how the actions were assembled to become the three alternatives carried forward for detailed analysis.

### C. Alternatives Carried Forward for Detailed Analysis, including the Preferred Alternative

Pre-1999 No Action Alternative:

Post-1999 No Action Alternative:

Alternative 1 (CWA Lead):

Alternative 2 (Joint Authorities):

Alternative 3 (SMCRA Lead):

### D. Analysis of Alternatives

This section in essence would contain the existing "Section C: Detailed Description of Alternatives"

John,

Good outline. I especially liked the Who/what/when/how approach, that's a good way to make sure our explanation is organized. However, who/what/when/how naturally leads one to look for a "why" column.

To belabor a point I know you're all sick of hearing, the "Why" in this case is supposed to be "to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills." In the case of the alternatives framework that we're working with, "Why?" is instead going to be the public's response when they see that, to accomplish the EIS goal, all we've proposed is alternative locations to house the rubber stamp that issues the permits. Why on earth would we even prepare an EIS on such a non-event as tinkering with the permit issuance process, UNLESS we also fully develop and provide the details on HOW each one of the alternatives is really going to minimize environmental impacts?

Mike and I argued yesterday over the need to provide details on how the programs would evaluate permits under each of the alternatives. Mike said we don't need to go into the details because it's a PROGRAMMATIC EIS. Everyone should re-read the settlement agreement: it doesn't restrict us to doing a PROGRAMMATIC EIS, it says we will prepare AN EIS. Even if we call it a programmatic EIS, where is it written that programmatic EIS's should offer only vague alternatives - especially a programmatic EIS that involved four years of studies that documented environmental impacts that need to be dealt with? Again, it seems that hiding behind the "programmatic" veil that we as agencies have unilaterally chosen and defined, really violates the spirit of the settlement agreement.

I still believe we need to take a hypothetical mine project and walk it through each alternative, so that the public (and even the agencies, for that matter!) understand the advantages and disadvantages of each one. Take a mine project that proposes 3 miles of intermittent and perennial stream fills in four different valleys. The streams in each valley contain good to excellent water quality and support aquatic life populations that score as good to excellent relative to regional reference streams. The entire project, including the associated mineral extraction area, haul roads, etc., will impact one square mile of typical Appalachian hardwood forest. Under Alternative 1, the Corps will process this as an individual Section 404 permit. What questions do we need to answer for the public to understand how the Corps would evaluate this permit? What questions do we need to answer in order for us, as agencies, to understand how the Corps would evaluate the permit, and what unintended consequences might there be to existing programs? For example, the question I've asked many times but never get an answer to: how will the Corps justify a "significant degradation" determination? Corps issuance of any permit means that the Corps has determined that the project will not result in "significant degradation" as defined by the 404(b)(1) guidelines; the significant degradation test trumps even the public interest review and the practicable alternatives test. To our knowledge, there is no other single industry or activity in the country that receives Section 404 authorization for the total elimination of waters of the United States on the scale that stream destruction occurs with mountaintop mining. (Contrary to Dave Vandelinde's arguments, the impacts of Walmart and

even highway projects pale in comparison to the mining impacts.) If the Corps starts issuing permits for the total destruction of miles of streams, what precedent does that set for the significant degradation test for the "big box" stores and shopping malls and housing developments and all the other permit applicants that now have relatively minor impacts on streams-- would the Corps be still able to require them to avoid the streams?

What would happen to this permit in Alternative 2? The Corps has to make a case-by-case determination of the applicability of NWP 21. How will it do that -- how will the "minimal effects" call be made? Are we seriously going to propose that some sort of "compensatory mitigation" can be fabricated that would truly replace the lost functions and values of the destroyed miles of streams, to the degree that we could consider impacts to be less than minimal? How many miles of stream loss a year are we going to be willing to accept under the cumulative impact test required for nationwide permits? What precedents do these decisions set for attempts to limit the loss of streams resulting from other types of activities authorized by other nationwides?

Again, I know you're all tired of hearing this same argument, but it's hard to stay quiet about this when I really believe we're doing the public and the heart of the Clean Water Act a great disservice if we don't think this through and provide everyone with a clear "vision" of where these alternatives are going.

From: "Mike Robinson" <MROBINSO@OSMRE.GOV>  
To: <Forren.John@epamail.epa.gov>, <Cindy\_Tibbott@fws.gov>  
Date: Fri, Nov 1, 2002 12:51 PM  
Subject: Re: Alternatives Format

Cindy--Sorry I didn't reply sooner, but I'm composing away on the OSM assignments for completing Chapters I, II, and IV. Plus, when I returned from Camp Hill, I found out that I'm acting Regional Director for the balance of the week while our eastern and western SESers pass the baton.

I'm concerned that we can't maintain the 11/11 schedule deadline and conduct your proposed exercise--although it does have merit. The best we can do at this point is to try between now and 11/11 to generally spell out the consequences of the actions on applicants' mining proposals more thoroughly in our fleshing out of Chapter IV. I suggest that maybe between the 11/25 internal draft and the camera ready copy the EIS SC could discuss the possibility of exploring what you propose and consider possibly beefing up the consequences chapter more with a few scenarios of generic permits (large and small--to take into account Les Vincent's comments).

P.S.--Will we still see the Terrestrial Studies cover sheet(s) today? Did you receive the outstanding studies from Handel and Stouffer? Tick, tick, tick.....!!

>>> <Cindy\_Tibbott@fws.gov> 10/30/02 03:13PM >>>

Greetings all,

Hope you had a better drive back from Camp Hill than I did last night; I could have done without the October snow.

John's Alternatives Format got me thinking about some of our discussions this week about how much detail we need to put into the Alternatives, and I typed up some concerns -- please see the attached file.

As a follow-up to my comments, I'd like to propose that we assemble ASAP, maybe again at Camp Hill, if Jennifer can accommodate us, with a facilitator, to walk a hypothetical mountaintop removal mine project through each alternative. The exercise would help us define the differences between the alternatives, and reveal any hidden "unintended consequences" of the various proposals. Any thoughts?

(See attached file: alternativedisussion.wpd)

Forren.John@epamail.epa.gov To: Cindy Tibbott  
<cindy\_tibbott@fws.gov>, "Dave Densmore (E-mail)" <dave\_densmore@fws.gov>, Rider.David@epamail.epa.gov, Dave Hartos <dhartos@osmre.gov>, Dave Vandelinde <dvandelinde@mail.dep.state.wv.us>, Suriano.Elaine@epamail.epa.gov, Russ Hunter <hunter@mail.dep.state.wv.us>

EXHIBIT 46



520

David Rider

11/07/2002 11:38 AM

To: Stefania Shamet/R3/USEPA/US@EPA  
cc: Dan Sweeney/R3/USEPA/US@EPA, John  
Forren/R3/USEPA/US@EPA, Stephen Field/R3/USEPA/US@EPA,  
William Hoffman/R3/USEPA/US@EPA  
Subject: Re: MTM study

Stef,

I am confident that the EIS will recommend further studies; and recommend monitoring at a minimum for selenium, sulfates and conductivity ... everywhere in Appalachia.

Stefania Shamet

Stefania Shamet

11/07/02 08:10 AM

To: David Rider/R3/USEPA/US@EPA  
cc: John Forren/R3/USEPA/US@EPA, William  
Hoffman/R3/USEPA/US@EPA, Dan Sweeney/R3/USEPA/US@EPA,  
Stephen Field/R3/USEPA/US@EPA  
Subject: MTM study

Hi Dave. Thanks for getting back to me yesterday. Based on your and John's responses, I think my voice mail probably wasn't clear, so let me try again. My question actually involves the programmatic EIS, although it arises in the context of the Hobet permit.

In connection with the Hobet NPDES permit, the WPD required that, in addition to the usual provisions, Hobet must monitor for selenium, sulfates and conductivity. This requirement came in response to the paired streams study conducted by the Wheeling office in connection with the programmatic EIS. Based on that study, WPD concluded that discharges associated with MTM activities have the potential to impair aquatic life uses, with the parameters of concern being selenium, sulfates and conductivity.

WVDEP pushed back pretty hard on this one. Their rationale wasn't entirely clear, in that they seemed to be arguing both that the study was insufficiently significant to warrant changes to the NPDES permit AND that the study has nationwide implications that EPA should be addressing on a national scale rather than through the permit. (Ken seemed a little sheepish taking either position.) In any case, one message from WVDEP that came through loud and clear was that they're feeling singled out. They had all sorts of questions about how R4 is using the study for Ky waters and whether R3 is going to require the monitoring in all R3 mining permits (they refuse to concede the point that the study examined the impact of MTM-related discharges and was not necessarily applicable to mining activity generally). In any case, Dan is talking to R4 and Ky, but the conversation also raised a number of questions about how the study was being used for purposes of the programmatic EIS, whether the programmatic EIS is likely to view the study results as applicable everywhere in Appalachia, whether there are EIS recommendations for further studies, etc.

Can you give me any insight? [Dan - if I've inaccurately summarized yesterday's issues, please feel free to put in your two cents' worth]

Thanks!

From: <Cindy\_Tibbott@fws.gov>  
To: <mrobinso@osmre.gov>, <rider.david@epa.gov>, <forren.john@epa.gov>, <James.M.Townsend@ld02usace.army.mil>, <rhunter@mail.dep.state.vv.us>, <Paul.Rothman@mail.state.ky.us>, <lsv@mme.state.va.us>, <jcooker@osmre.gov>, <jstamp@gfnet.com>, <dandelinde@mail.dep.state.vv.us>, <dhartos@osmre.gov>, <Hoffman.William@epamail.epa.gov>, <Dave\_Densmore@fws.gov>  
Date: Tue, Nov 12, 2002 11:35 AM  
Subject: OSM's draft on fill inventory

I forwarded the fill inventory draft to our Virginia field office. As Roberta Hylton is careful to point out, their review is based on looking at this one piece of the EIS out of context. However, from the standpoint of the "fresh eyes" perspective we've talked about lately, the comments show where we can expect confusion to occur when the public reads this section.

----- Forwarded by Cindy Tibbott/R5/FWS/DOI on 11/12/02 10:18 AM -----

Roberta Hylton

To: Cindy Tibbott/R5/FWS/DOI@FWS  
cc: Brian Evans/R5/FWS/DOI@FWS,  
Shane Hanlon/R5/FWS/DOI@FWS, Gale  
Heffinger/R5/FWS/DOI@FWS, David  
Pelren/R4/FWS/DOI@FWS, Robert  
Bay/R4/FWS/DOI@FWS, Daniel  
Ramsey/R5/FWS/DOI@FWS  
Subject: OSM's draft on fill inventory

Per your request, we've done a quick review of the draft fill inventory that you fed-exed to me. Here are my comments (they include comments of Brian Evans of this office too). We are reviewing this document out of context of the rest of the draft EIS and ask that our comments be considered with that in mind.

--The document looks at data from 1985 forward only. Page III.K-2 of the document states that the reason for this limitation is that "data from the years immediately following approval of a permanent program in a state shows a high level of permitting activity representing [a] 'repermitting' requirement rather than useful information on the trends of permitting new mines." While filtering out the noise of repermitting might be a worthy goal, we still need to look at new mining/valley fills that occurred prior to 1985. Is there no way to do this? In fact, the second full paragraph on page III.K-3 states that this was done for data after 1985 when there were "changes in ownership, sale of mining companies, closure and reopening of operations based on market conditions, etc." It seems odd that it was not done for pre-1985 data, but was done for post-1985 data. Knowing that repermitting noise can be filtered out and was filtered out for the post-1985 data might lead to suspicion that, for some reason, the EIS compilers do not want to include pre-1985 data. If there's no reporting on valley fills prior to 1985, how can we get a full picture of cumulative

EXHIBIT 47

EXHIBIT 48

impacts over time and space?

--We have lots of problems with those sections purporting to use trends in watershed acreages above valley fills to evaluate the overall impact of fills. First of all, the watershed acreages considered are those beginning at the toe of the fill and running to.....well, the document isn't quite clear in some places on this point. Are they looking at all upstream and upland areas or just those drained by blue-line streams? Even if acreages considered include all areas upstream and upland of the toe of the fill, this in no way accounts for the total area impacted by valley fills. What about downstream areas impacted by fills? What about impacts to streams and areas outside of the drainage areas (i.e., habitat fragmentation for some terrestrial species, limiting the ability to recover species in one watershed by eliminating them in another, etc.)

--This document has some problems with terms. It uses "watershed impacts" when what it means is some narrowly defined acreage within a watershed. Reporting that a specific acreage is impacted is not the same thing as evaluating what impacts are. For example, the title of the table on page III.K-28 is "Watershed Impacts by States." Actually, this table lists the acreage of impact from the toe of the slope of a fill to some unspecified upland/upstream mark.

--on page III.K-27, the document states, "Some valley fills may envelope [sic] the majority of the watershed, and others are farther downstream.....The watershed acreage is determined by measuring the upland area above each fill toe." Does this mean that they include all acreage upstream of the point of the toe of the fill or do they stop at ephemeral areas? Also, acreage upland/upstream of the fill does not include the total area impacted by a fill because it does not consider areas impacted downstream of a fill or areas in other watersheds that may have been impacted by the fill. This sort of trend analysis is a gross underestimation of the area impacted by fills.

--Page III.K-36 states, "The final measurement for evaluating impacts from valley fill construction and predicting their overall impact on the environment is stream loss" and goes on to explain that ephemeral areas were not considered. "Stream loss," as reported in the remainder of the document is the valley fill footprint. For the "stream impacts" tables and graphs at this point in the document, it is painfully clear that they are looking only at the fill footprint. First, I would say that we must look at much more than the acres of stream lost or buried by fill. Stream loss and other impacts can extend well upstream and downstream of the footprint of valley fills and sometimes even outside of the drainage that is directly impacted. This type of trend analysis does not provide a comprehensive or "final measurement for evaluating impacts from valley fill construction" and can predict only a fraction of "the overall impact on the environment."

--In summary, this "fill inventory" will grossly underestimate the acreage impacted by valley fills and does nothing to consider how areas upstream and downstream will be impacted.

Gregory Peck

11/15/2002 04:57 PM

To: John Goodin/DC/USEPA/US@EPA

cc:

Subject: Fwd: Chapters I & II comments

Cindy Tibbott's "fatal flaw" comments on Chapters I and II for your amusement.  
--- Forwarded by Gregory Peck/DC/USEPA/US on 11/15/2002 04:56 PM ---



Mike Robinson  
<MROBINSO@OSMRE.GOV>

To: Gregory Peck/DC/USEPA/US@EPA

cc:

Subject: Fwd: Chapters I & II comments

11/13/2002 11:29 AM

fyi

--- Message from Cindy\_Tibbott@fws.gov on Wed, 13 Nov 2002 10:53:32 -0500 ---

To: "Mike Robinson" <MROBINSO@OSMRE.GOV>

cc: bcl@mme.state.va.us, Charles.K.Stark@hq02.usace.army.mil, dave\_densmore@fws.gov, dvand  
Forren.John@epamail.epa.gov, goonrad@imcc.isa.us, Hoffman.William@epamail.epa.gov, Jam  
jstump@gfnet.com, Katherine.L.Trott@hq02.usace.army.mil, lsv@mme.state.va.us, Paul.Rothm  
rhunter@mail.dep.state.wv.us, rider.david@epa.gov, suriano.elaine@epa.gov, Dave\_Densmore@

Subject: Chapters I & II comments

(See attached file: chapter comments.wpd)



chapter comments.wp

EXHIBIT 49

Review of Chapters I and II-- Cindy Tibbott

These chapter write-ups make it clear that the ability of compensatory mitigation to reduce impacts to minimal levels is the linchpin of each of the alternatives. Because compensatory mitigation for streams is an untested, unproven concept, and many believe that it can't be accomplished, we have (another) fatal flaw in our alternatives framework. (Other fatal flaws have been discussed in previous e-mails and meetings, and won't be repeated here.)

Throughout the document, the Louisville district protocol is offered as the solution to achieving adequate compensatory mitigation. The document should note that it will take years to collect and massage regional data to expand use of the protocol to areas outside of eastern KY. It took four years to develop for that area, and most of the resource baseline data had already been collected by KY Div. of Water. What happens in the meantime in the other states?

Chapter I, Section E, second paragraph. Delete the last two sentences, as they are out of context with the SMCRA discussion, confusing, and redundant with the 3<sup>rd</sup> paragraph.

Chapter I, Section E, third paragraph. Revise the last sentence to read: "CWA Section 404 and the standards by which Section 404 permit applications are evaluated (the "404(b)(1) guidelines") requires applicants proposing to place dredged or fill material into waters of the United States to demonstrate that they have considered upland alternatives that would avoid streams, and that they have taken all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. However, the 404(b)(1) guidelines prohibit the issuance of a Section 404 permit for a project that would cause or contribute to significant degradation of waters of the United States." (Same language in Issue B, Direct Stream Loss, Regulatory program in 1998, second paragraph)

Chapter II, Section A, 3, b., 1<sup>st</sup> paragraph, 2<sup>nd</sup> sentence: change stream "class" designation to stream "reach" designation.

Chapter II, Section A, 3, e, 2<sup>nd</sup> paragraph, end of second sentence: change stream "classification" to stream "condition".

Chapter II, Section B, 1<sup>st</sup> sentence: Unclear – the Bragg decision occurred before any alternatives frameworks were discussed or developed...

Chapter II, Section B, b. Clean Water Act fill restrictions, 1<sup>st</sup> sentence, change to "Several CWA statutory or regulatory provisions were considered at different times throughout the alternative framework development process....."

Chapter II, Section B, 1) CWA antidegradation, 1<sup>st</sup> sentence, change to "contrary to EPA's antidegradation policy, which states that existing uses of waters must be maintained and protected." (Delete "the CWA principle that nothing can happen to alter the existing use of the Nation's streams). The second sentence is an inappropriate argument, as there are no other

activities in the country that routinely eliminate entire streams.

Chapter II, Section B, 2), first sentence, change to "generally unsuitable for valley fills". Last sentence: this is not a rebuttable presumption just for ADID streams, but for any project to be authorized via Section 404.

Chapter II, Section B, 2), third paragraph: ADID doesn't confer a "special" designation (somebody seems to be mixing up CWA terminology here). ADID is just a warning about the likelihood of a permit being granted or not. As stated earlier in this section, it's not an outright prohibition, so how can using it be "arbitrary and capricious"?

Chapter II, Section B, 2), fourth paragraph, last two sentences – are inaccurate and should be deleted. The Corps can't issue a permit that causes significant degradation, no matter what the public interest review says.

Chapter II, Section B, 3), second paragraph: The entire argument advanced in this paragraph is inaccurate. Designating all headwater streams as special aquatic sites is no different than designating all wetlands or all riffle-pool complexes as special aquatic sites as EPA has already done in the 404 (b)(1) guidelines. Furthermore, since most of the streams that will be filled in already contain riffle-pool complexes, we could argue that we're just clarifying what's already in the 404(b)(1) guidelines.

Chapter II, Section B, last paragraph. The statement that through mitigation, the filling of a stream in its native state could result in overall watershed improvements is unsupportable and should be deleted.

Chapter II, Section C, 1<sup>st</sup> paragraph, last sentence: Insert "regulatory" as in "Overall, these statutory and regulatory objectives..."

Chapter II, Section C, introductory sections – Needs a major re-write by someone who understands the Clean Water Act. The CWA isn't about identifying it, filling it in, and providing compensatory mitigation. It's about protecting and maintaining the chemical, physical, and biological integrity of the nation's waters, as in ALL waters, not just those with "special/high-value environmental resources." All states are supposed to have Tier I protection for their waters – it's called the "floor" of water quality protection under the Clean Water Act, and is supposed to provide the "level playing field" for protection of waters.

Chapter II, Section C, 2. 2003 no action alternative, 6<sup>th</sup> paragraph, 4<sup>th</sup> sentence. Remove FWS Cookeville, TN staff as collaborator with the Louisville district in the development of the stream protocol. Concerns expressed by Cookeville in the development of the protocol were ignored, and they do not believe that the protocol is appropriate for use in determining compensatory mitigation, as it is being presented in the EIS.

Chapter II, Section C, Alternative 1, a. Regulatory Responsibilities, first paragraph, 5<sup>th</sup> line: add

"unsuitable for filling unless demonstrated otherwise after rigorous review of site-specific water quality and biological data"

Alternative 3, 2) Process, 4<sup>th</sup> paragraph, second sentence. Revise to read: "The permit can be denied if the project will cause or contribute to significant degradation, or if the proposal...." (Also under Section D, alternative 2).

Section C, Alternative 3, Regulatory Responsibilities, 3<sup>rd</sup> paragraph, 1<sup>st</sup> sentence: change to "waters of the US in Appalachia tend to begin in very small watersheds..."

Section D, Alternative 2, Action 1.1, second page, second asterisk item: Mitigation for "indirect impairment anticipated (meets TMDL, if 303(d) listed stream)"? Neither a Section 404 permit nor a SMCRA permit can be issued that would violate state water quality standards, so what is this saying?

Chapter II's subheadings need some re-formatting to make the major headings stand out better (bold, for No Action Alternative, Alternative 1, etc.), and the subheadings appear less prominent (no bold for "Regulatory Responsibilities," etc.).

Remember that "mitigation" as used by the federal government is a term that incorporates avoidance, minimization, and compensation. In most cases where they are used throughout the document, "mitigated" should be replaced with "compensated" and "mitigation" replaced with "compensatory mitigation."

Throughout the document, wherever FWS involvement with permit review is mentioned, it is only in the context of endangered species. In most of these cases, FWCA coordination should also be mentioned.

Throughout the document, "less than minimal" should be changed to "minimal."

The 404(a) process is mentioned throughout the document as EPA's avenue for objection to a permit. This should be restated as EPA's and FWS' avenue for objection.

**From:** <Cindy.Tibbott@fws.gov>  
**To:** <rider.david@epamail.epa.gov>  
**Date:** Fri, Nov 15, 2002 3:17 PM  
**Subject:** Suggested edits/editions for aquatic study sheet

(See attached file: aquaticqualificationscomments.wpd)

**CC:** <dave\_densmore@fws.gov>, <DHARTOS@OSMRE.GOV>, <dvandelin@dep.state.wv.us>, <Hodgkiss.Kathy@epamail.epa.gov>, <Hoffman.William@epamail.epa.gov>, <James.M.Townsend@lrl02.usace.army.mil>, <JCOKER@OSMRE.GOV>, <jstump@gfnet.com>, <Katherine.L.Trott@HQ02.USACE.ARMY.MIL>, <MROBINSON@OSMRE.GOV>, <rhunter@mail.dep.state.wv.us>, <suriano.elaine@epamail.epa.gov>, <Forren.John@epamail.epa.gov>

Attachment(s):  
Attachment File 1.wpd  
Attachment File 2.822

EXHIBIT 50

## COMMENTS ON AQUATIC STUDY QUALIFICATION WRITE-UP – Cindy Tibbott

### Headwater Streams

1<sup>st</sup> paragraph – Recommend replacing this paragraph with the following: “To help assess the potential impact of stream filling activities on the aquatic ecosystem, a one-day invitational meeting was organized by FWS. The purpose of the workshop was to assemble experts in stream ecology to discuss the value of headwater streams and the possibility of setting acceptable impact thresholds.”

2<sup>nd</sup> paragraph – Recommend replacing with the following: “The proceedings provide valuable information on the state-of-the-art of knowledge about headwater streams, which unfortunately are little understood outside of scientific circles. In fact, meeting participants discussed the fact that historically, small streams have been under-protected by regulatory agencies because of ignorance about their values. An industry representative discussed potential opportunities to create wetlands and stream channels as part of reclamation. The stream experts raised concern that many headwater streams are being eliminated by valley filling with no requirement for pre-impact biological inventories, and that many species may be unknowingly lost from the study area’s unique ecosystem. They also stressed the importance of small, forested headwater streams and their associated biological communities in providing organic production that feeds downstream aquatic ecosystems. The experts concluded that although the state of scientific knowledge is far enough advanced to be able to say that headwater streams are too important to be destroyed, the state of knowledge is not far enough advanced to be able to decide which watersheds can be filled in and how many.”

### Fisheries

2<sup>nd</sup> paragraph, 2<sup>nd</sup> sentence – Stauffer’s final report states that mountaintop mining/valley fill coal mining “has impacted” the condition of streams (not “has had a severe effect on the condition of streams.”

### Aquatic Ecosystem Enhancement

There’s no summary information here. I suggest using the summary prepared for the January 2001 status report:

- With respect to mitigating the direct stream loss from valley fill construction, it is difficult if not impossible to reconstruct free flowing streams on or adjacent to mined sites. The difficulty results from the inability to capture sufficient groundwater flows necessary to provide a constant source of flow for the new stream. Only in rare instances will flows be sufficiently captured such that a new stream can be created on the mined site.
- Therefore, mitigation or compensation for these losses must generally take the form of restoring degraded streams at offsite locations through a variety of techniques including

riparian planting and habitat restoration, or by creating other aquatic resources (ponds or wetland areas) at onsite or offsite locations. While these aquatic areas will seldom replace the functions lost in the headwater areas, they can provide or enhance other aquatic ecosystem functions, and may be considered as possible mitigation measures in limited situations.

• Ponds and wetland areas have been created on mining sites, in connection with sediment control structures, and these perform some aquatic functions. However, it is common practice to remove the structures after the bonding period because of safety and/or long-term management concerns. Consideration might be given to leaving shallow pond-wetland resources on site.

A-135

From: <Foran.John@epamail.epa.gov>  
 To: Mike Robinson <MROBINSO@OSMRE.GOV>  
 Date: Fri, Nov 15, 2002 9:59 AM  
 Subject: More on Sp Aquatic Sites

Just an update on our conference call yesterday afternoon with Greg Peck of our HQ office.

Greg disagrees that the 50% restriction on first order streams in second order watersheds would effectively eliminate mining in those watersheds. He further indicated he was one of the principal negotiators during the settlement negotiations between the plaintiffs and government/industry and disagreed with the notion that industry reps walked out of the negotiations because a similar option was proposed. Greg suggested this option to address our goal of sharply defining the differences among the alternatives and to address cumulative impacts, which he feels is lacking among the alternatives now.

We all agreed, however, to press on under the existing schedule but to continue parallel work on options to augment the alternatives for possible inclusion in the EIS during the small window of time prior to preparation of the camera-ready copy, which would be the preference, or during preparation of the Final EIS as a last resort. Nothing would preclude us from modifying the alternatives presented in the Final EIS as a means of being responsive to comments and concerns expressed during the Draft EIS comment period. As a result, EPA Region III has committed to draft a written proposal of this cumulative impacts threshold to submit to EPA HQ and subsequently to the Steering Committee for consideration.

Although we would drop the provision in Alternative 1 to designate headwater streams in the highlands as Special Aquatic Sites, Greg suggests that we emphasize that riffle/pool complexes, which already are identified as Special Aquatic Sites in the 404(b)(1) Guidelines, are typically found in these streams and that we use these complexes as a means to leverage more rigorous permit reviews and cumulative impact assessments (of course all of us, including Greg, are aware that wetlands have this same designation, yet continue to be rapidly turned into farmland; still, this would be a better approach than simply falling back to the IP-only reviews in Alt 1).

Whether or not the "bright line" percentage threshold eventually becomes part of Alternative 1, we should still include in Alternatives 1 and 2 a commitment to develop a cumulative impact assessment protocol specific to headwater streams.

Please let me know your reactions.

John

CC: <Cindy\_Tibbott@fws.gov>, <dave\_densmore@fws.gov>, <rider.devid@epamail.epa.gov>, <DHARTOS@OSMRE.GOV>, <dvandelinde@mail.dep.state.vv.us>, <suriano.elaine@epamail.epa.gov>, <James.M.Townsend@h02.usace.army.mil>, <JCOKER@OSMRE.GOV>, <jstump@gnnet.com>, <Katherine.L.Trott@HQ02.USACE.ARMY.MIL>, <rhunter@mail.dep.state.vv.us>, <Hoffman.William@epamail.epa.gov>, <Hodgkiss.Kathy@epamail.epa.gov>

EXHIBIT 51

987



Kathy Hodgkiss  
11/18/2002 06:04 PM

To: Rich Kamp/R3/USEPA/US@EPA, David Rider/R3/USEPA/US@EPA,  
Elsie Surleno/DC/USEPA/US@EPA, John  
Forren/R3/USEPA/US@EPA, Kathy Hodgkiss/R3/USEPA/US@EPA,  
William Hoffman/R3/USEPA/US@EPA, Gregory  
Peck/DC/USEPA/US@EPA, Benjamin\_Tuggle@fws.gov,  
Cindy\_Tibbott@fws.gov, dave\_densmore@fws.gov,  
mamie\_parker@fws.gov, jstump@gnnet.com,  
Charles.K.Stark@hq02.usace.army.mil,  
Katherine.L.Trott@HQ02.USACE.ARMY.MIL, goonrad@imcc.isa.us,  
James.M.Townsend@HQ02.usace.army.mil,  
dvandefinde@mail.dep.state.vv.us, mcrum@mail.dep.state.vv.us,  
rhunter@mail.dep.state.vv.us, Paul.Rothman@mail.state.ky.us,  
bcd@mme.state.va.us, lsv@mme.state.va.us, Al Klein  
<AKLEIN@OSMRE.GOV>, Brent Wahlquist  
<BWAHLQUI@OSMRE.GOV>, Dave Hartos  
<DHARTOS@OSMRE.GOV>, Jeff Coker <JCOKER@OSMRE.GOV>,  
Thomas Shope <TSHOPE@OSMRE.GOV>

cc:

Subject: MTM/VF DEIS Conference Call Thursday 11/21 9-11am; call  
877/216-4412, 86654#

#### Executive Committee Members --

We have scheduled a combined Executive Committee/Steering Committee Call this Thursday (see proposed agenda below). Please let me know if you have comments or suggestions for the agenda.

By now you should have received Chapters 1 (Purpose and Need) and 2 (Alternatives) of the DEIS (sent 11/12) and Chapter 4 (Environmental Consequences) (sent earlier today) via email from Mike Robinson. Please review these before the call. Chapter 3 (Affected Environment) is available but the files are enormous and will require several emails to send. If you are interested in reviewing Chapter 3, please let me know and I will get the files to you. Please see table of contents in the following attachment for more info about what you will find in Chapter 3.



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Please call me if you have any questions or need additional information. thanks, Kathy

### Agenda Mountaintop Mining/Valley Fill DEIS

#### Executive committee & Steering Committee Conference Call

November 21, 2002 9:00 - 11:00am

call in number: 877/216-4412, access code 86654#

I

#### 1) Introductions (~5 minutes)

##### Existing and New Executive Committee Members:

- Kathy Hodgkiss, EPA chairperson replacing Mike Castle
- Brent Wahlquist, OSM - Director - OSM - Appalachian Regional Coordinating Center, replacing
- Al Klein (who will be on the call too)
- Kirk Stark, COE, interim (COE EC member is vacant)
- Mamie Parker, FWS
- Matt Crum, WVDEP

#### Steering Committee Roll Call

#### 2) Steering Committee briefing on status of DEIS: (~60 minutes)

##### Chapter 1 (Purpose and Need) revised to:

- explain scoping issues considered and dismissed based on significance of issue or study findings
- explain alternative framework and fill restriction actions that were considered, but dismissed from further analysis (with reasons)

##### Chapter II (Alternatives) revised to:

- retain 3-Alternative framework endorsed by principals
- increase contrast of "Government Efficiency/Coordinated Decision Making" actions; provide new/revised tables showing contrast
- considered proposal for "special aquatic sites;" currently is unevenly treated in Chapters I and II; will need revision since concept is not accepted by EPA and/or COE HQ

- For EC consideration: EPA proposal for avoidance of 50% of first order streams in 2nd order watershed not yet fully presented, discussed, accepted or integrated

##### Chapter III (Affected Environment) revised to:

- incorporate all finalized technical studies
- incorporate any "no-action consequences" narratives for those issues dismissed in Chapter I that were placed in earlier versions of DEIS

##### Chapter IV (Consequences of Alternatives) prepared, but:

- all sections not yet put in consistent format or reviewed by SC and revised based on comments
- introduction/summary consequences sections not prepared

#### Issues Raised During Preparation:

- Lack of environmental contrast; is a fill restriction component needed in Alternative 1 to provide most environmentally-protective alternative?

- discussions to date concluded that no authority currently exists for Alternative 1 suggestions (anti-deg., ADID, special aquatic sites, etc.)

- OFA states that NEPA compliance not satisfied; alternatives need not be limited to existing statutory authority--Should a "no mining" or other restrictive alternative be included?

- Counter: current contrast is "administrative" and similar environmental consequences is ok for programmatic DEIS and consistent with 1999 Notice of Intent and 1998 settlement agreement

- FWS concerned that alternatives hinge on effectiveness of mitigation -- based on COE protocol that is not fully or adequately developed and untested in practice

- FWS suggests that the DEIS fully explain how permits will be denied under each alternative and that detailed evaluation of the outcome of several case examples under each alternative should be included

- Counterpoint: An EIS doesn't have to have all the actions fleshed out in great detail until after the Record of Decision (ROD). Further development of the actions that are part of the ROD will occur with appropriate APA input, NEPA compliance, and regulatory analysis, as appropriate, when implemented

- Another view: This is not an EIS recommending Congressional action to limit fills--Congress has already taken a position in the CWA and SMCRA and all regulatory requirements to date have been through NEPA and regulatory analysis--this EIS is programmatic on how coordinated decision making can occur to effect environmental protections already required

- Need for legal review for: 1) accuracy of agency statutory regulatory positions portrayed or stated;

EXHIBIT 52

2) proper wording of baseline and no action descriptions of program to limit liability

Schedule: targeting early spring (end of February) release of draft EIS:

- all SC efforts geared to providing Gannett Fleming (GF) materials for November 25 draft CD
  - \*Chapters I and II--Wednesday 11/13; Chapter IV--Monday 11/18
  - \*Other minor insertions ok through 11/20
- GF to forward CD with preliminary draft of EIS to all reviewers by the end of November.
- Agencies have December to perform final detailed review, including legal review, and to edit the preliminary draft.
- EPA to give GF a revised document on CD by 1/10/03 for preparation of GPO camera-ready version, 100 CDs, and agreed-upon number of hard copies for agencies

Status of Economic Study Review by Hill and Associates

**Other Logistics:**

- distribution process discussed:
  - \*post on web sites when sent to GPO, official public comment period starts with FR after printing completed
  - \*send return post card with CD to all stakeholders involved in scoping for request for executive summary or full "hard" copy
  - \*send hard copies to selected libraries and EIS agency offices within study area and announce availability of document for public review at those locations in FR
- Question to EC: *Who will sign (signatures) for each agency?*

**3) Executive Committee questions and discussions for clarification of issues (~15 minutes)**

**4) Executive Committee Session (~40 minutes)**

**Discuss results of EC review of draft chapters**

- Areas improvements/revisions needed

**Discuss Schedule**

- factoring in:
  - the results of this review
  - December window for SC revisions, legal review
  - Additional EC review
  - Surname review
  - Briefing principals

- 11/29/02: preliminary draft EIS on CD made available to agencies for detailed review and editing (pending the outcome of this preliminary EC review)
- 12/1-31/02: window for final review and editing week of 12/16: briefing for principals??
- 1/1/03: final steering committee and legal review changes provided to EPA
- 1/10/03: final edited materials to go to Gannett Fleming
- 1/31/03: Gannett Fleming produces camera-ready copy
- + 4 - 8 weeks GPO printing

Discuss briefing principals on DEIS status, decisions, issues that may arise in public comments



ECagenda112102.wpc

Kathy Hodgkiss, Acting Director  
Environmental Services Division  
U.S. EPA Region 3  
215/814-3151